82-614

CASE NO.

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in the

Supreme Court

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United States

July Term, 1982

CHARLES M. REBHAN and
CORAL GABLES IMPORTED MOTORCARS, INC.

vs.

FIAT MOTORS OF NORTH AMERICA

APPENDIX

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APPENDIX A

CORAL GABLES IMPORTED MOTORCARS, INC., et al.,
Plaintiffs-Appellees,

v.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant-Appellant.

No. 80-5787.

United States Court of Appeals, Eleventh Circuit.

April 23, 1982.

Imported automobile franchisee and its owner sued franchisor for fraud and breach of alleged oral contract to pay for grand opening, to defer payment of parts and to take care of any losses the franchisee might sustain until the vehicles arrived. The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., rendered judgment for plaintiffs on jury verdict, and franchisor appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) language of second franchise releasing franchisor from any and all claims, demands, contracts and liabilities arising out of or in connection with prior franchises encompassed instant claims; (2) release was not vitiated on grounds of continuing fraud or duress; and (3) since plaintiffs knew or originally should have known all pertinent facts constituting alleged fraudulent activities at time the second franchise was executed execution thereof waived the fraud claims.

Reversed and remanded.

1. Federal Courts—410, 412

In determining whether provision of automobile dealer franchise agreement that it was to be governed by and construed under New York law was to be given effect, the court looked to the substantive laws, including the conflict of law rules, the forum state, i.e., Florida.

2. Contracts—129(1)

Parties' agreement as to which law shall govern the construction of a contract is recognized under Florida law unless the chosen law contravenes Florida's public policy.

3. Contracts—129(1)

Since New York law concerning scope and effect of general releases does not contravene any articulated public policy of Florida, provision of automobile dealership franchise that New York law governed construction and operation would be given effect by Florida courts.

4. Release—31

Under New York law, construction of a general release is governed by principles of contract law and intention of the parties is the controlling issue.

5. Release—25

New York law requires that scope of a release be determined in context of the controversy at issue.

6. Release—31

A general release may be raised as a defense to claims for both tort and contract liability, under New York law.

7. Release—31

Where language of a general release is unmistakenly clear, New York law recognizes that intent of the parties can be discerned from the release itself.

8. Release—25

Under New York law, unless fraud, duress or illegality is established the language of a voluntary release will be given its full effect.

9. Release—31

Language of second automobile dealership franchise releasing franchisor from any and all claims, demands, contracts and liabilities arising from, out of or in connection with prior franchises encompassed franchisee's claims for fraud, breach of oral contract, promissory estoppel and negligence based on alleged oral agreement under prior franchise to pay for grand opening, to defer payment of parts and to cover losses franchisee might have in operating until the imported vehicles arrived. West's F.S.A. §320.642.

10. Release—17

Absent any allegation that automobile dealership franchisor renewed its prior promises or made new

ones at time renewal franchise was executed there was no basis for franchisee's claim that release, contained in renewal franchise, of any claims or liabilities arising out of prior franchises was tainted by any fraudulent representations five months prior to renewal franchise concerning deferred payments of parts and coverage of any losses franchisee might have in operating until vehicles arrived.

11. Release—18

Under New York law, a release is not voidable on grounds of economic duress unless it is shown that a threat was unlawfully made which caused involuntary acceptance of the contract terms under circumstances where no alternative was available.

12. Release—18

Mere hard bargaining positions or pressure of financial circumstances is not sufficient under New York law to avoid a release.

13. Release—18

Although automobile dealership franchisee and its owner would have been able to continue receiving employer cars and parts if they had not signed second franchise, which contained agreement releasing all claims under prior franchise, such was insufficient duress under New York law to vitiate the release.

14. Fraud—35

Under certain circumstances Florida courts have found that claims based on fraud have been waived by subsequent execution of an agreement respecting the same subject matter as the alleged fraudulent transaction.

15. Fraud—35

Waiver of a fraud claim will not be found, under Florida law, unless the defrauded party has actual or imputed knowledge of facts constituting the alleged fraud at time the subsequent agreement was made.

16. Fraud—35

Since at time of execution of second automobile franchise the franchisee knew or should reasonably have known of pertinent facts concerning alleged fraud in connection with franchisor's oral agreement to defer payment for parts and take care of any losses in operating dealership until vehicles arrived, execution of the second franchise amounted to waiver of the fraud claims regardless of effect of release clause of the renewal franchise. West's F.S.A. §320.642.

Greenbaum, Wolff & Ernst, James M. Brachman, New York City, Woodrow M. Melvin, Miami, Fla., for defendant-appellant.

Lane, Mitchell & Harris, P.A., C. Robert Murray, Miami, Fla., for Coral Gables Imported Motor Cars, Inc. and Rebhan.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, KRAVITCH and JOHNSON, Circuit Judges.

TUTTLE, Circuit Judge:

This diversity case involves various tort and contract claims arising from certain representations and promises made by appellant Fiat Motors of North America, Inc. (Fiat Motors) to appellees Coral Gables Imported Motorcars, Inc. and Charles Rebhan in connection with the execution of a Fiat franchise agreement. After trial by jury, the district court entered judgments against Fiat Motors in the total amount of $591,828.00. On appeal Fiat Motors raises numerous claims of error.

I. FACTS

In 1974 Fiat Motors had two dealer franchisees in Dade County, Florida. One of these dealerships was located in Coral Gables (central Dade County) and the other was located in Miami (north Dade County). Dissatisfied with these relationships, Fiat Motors terminated its franchises in early 1975 and appointed two new dealers, Hebert Oldsmobile in Homestead (south Dade County) and Autorico, Inc. in Miami. Apparently Fiat Motors was interested in establishing a third franchisee in central Dade County. And Rebhan, the owner of one of the most successful Dodge dealerships in the United States, was interested in acquiring a Fiat franchise for the Coral Gables area. In April of 1975, Fiat Motors and Rebhan began negotiations for a franchise agreement. At this time Rebhan, who later incorporated

under the name of Coral Gables Imported Motorcars, Inc. (Gables), had an oral commitment to lease land in the Coral Gables area. During the negotiations, Fiat Motors characterized the proposed new franchise as a "replacement" for the central Dade County franchise which it had terminated earlier that year. More significantly on May 1, 1975, after being advised by the Florida Department of Highway Safety and Motor Vehicles (Department) that it would not entertain protests regarding Gables' appointment, Fiat Motors informed Gables that its status as a "replacement dealer" had been cleared through the Department.[1]

In the context of Florida's statutory procedure for licensing motor vehicle dealers, the designation "replacement dealer" has special meaning. Section 320.642 provides:

> The department shall deny an application for a motor vehicle dealer license in any community or territory where the licensee's presently licensed franchised motor vehicle dealer or dealers have complied with licensee's agreements and are providing adequate representation in the community or territory for such licensee. The burden of proof in showing inadequate representation shall be on the licensee.

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[1]It is apparent, however, that both Fiat Motors and Gables were aware of the existence of the other two Fiat dealerships in Dade County. Moreover, Fiat Motors asserts that one of Rebhan's employees had a similar conversation with a Department representative, but that Gables made no attempt to confirm his "replacement" dealer status with the Director of the Department.

Fla.Stat. §320.642 (1979). In implementing this statutory provision, the Department has promulgated Rule 15C-1.08 which affords currently licensed dealers an opportunity to protest the issuance of a new license. This Rule also provides that the Department may convene a hearing if necessary to determine whether the application for a license should be granted or denied according to the criteria set forth in section 320.642. In the case of an application by a "replacement dealer," however, the Department apparently often finds it unnecessary to entertain protests since no additional competition will arise by virtue of a new licensee's replacement of a former dealer. In this situation, a licensing decision can be made without the substantial delays which otherwise result from the hearing process.

On May 14, 1975, Gables, allegedly relying on Fiat Motors' representation that it would be treated as a replacement dealer by the Department, executed an application for a franchise agreement. This agreement became effective on June 13, 1975. By letter of June 25, 1975, Fiat Motors formally advised the Department that it was appointing Gables as a replacement dealer for its former central Dade County franchise. On June 27, 1975, Rebhan executed a ten year lease agreement for the Coral Gables premises. He then began hiring and training salesmen, mechanics and other employees. No Fiat cars or parts could be shipped to Gables, however, until its license was granted. On July 11, 1975, the Department notified the other Fiat dealerships in Dade County of their right to protest Gables' application. Thereafter Hebert Oldsmobile and Autorico, Inc. filed protests against the appointment of Gables as a Fiat dealer. The same state official who had previously informed Fiat Motors that protests would not be

entertained then convened a hearing with respect to Gables' license application.

When Rebhan first learned about the protests in July of 1975, he contacted Dewey Manning, President of Fiat Motors. Rebhan alleged that during this conversation, Manning agreed to pay Gables $10,000 for a grand opening, to defer the payments for parts, and to take care of any losses Gables might have in operating the dealership until the Fiats arrived. Rebhan asserted that in reliance on these promises, he made every effort to keep the dealership open by selling used cars and Lancias, for which a license had been issued without protest. Although Fiat Motors contested the provisions of this oral contract at trial, it did admit to returning Gables' initial payment for its Fiat parts pending the licensing determination. Moreover, by letter dated September 5, 1975, Fiat Motors agreed to contribute $30,000 towards Gables' rental payments. Rebhan responded to this letter on September 16, 1975, by asserting that he thought other financial arrangements had been made. Fiat Motors subsequently forwarded two checks totaling $30,000 to Gables in September and October of 1975. The letter enclosing the second check stated: "This completes the program as outlined in previous correspondence." Both of these checks were endorsed by Gables under written protest and applied to Gables' rent account.

On October 24, 1975, the Department entered an order granting Gables' license as a Fiat dealer.[2] After

[2]In its order, the Department found that both Fiat Motors and Gables had acted under the belief that Gables would in fact be no more than a replacement dealer for the former Dade County franchise. It further found that the criteria for denying a license in section 320.642 had not been established.

the license was awarded, Gables began receiving Fiat cars and parts. By letter of October 28, 1975, Fiat Motors requested an immediate $15,000 payment on the parts with the remainder to be paid in $15,000 monthly installments. In forwarding his initial $15,000 payment, Rebhan indicated that he thought they had agreed to a much slower payback. Apparently no other conversations concerning Fiat Motors' alleged promises occurred during the next two months.

Gables' franchise agreement expired by its terms on December 31, 1975. On December 18, 1975, Gables executed a second franchise agreement which contained a release provision. Although Gables had been selling Fiats for several months, it continued to suffer financial losses through July of 1976 when the franchise was terminated. In March of 1976, Gables and Rebhan sued Fiat Motors alleging fraud, breach of an oral contract, promissory estoppel and negligence. Fiat Motors' motion for summary judgment was denied and the case proceeded to trial. The district court also denied Fiat Motors' motion for directed verdict and charged the jury on each of the four claims presented by Gables and Rebhan. The jury entered a general verdict in favor of Gables and Rebhan awarding them $425,000 as compensatory damages and $166,828 in punitive damages. The district court denied Fiat Motors' motion for judgment notwithstanding the verdict. Fiat Motors then brought this appeal raising numerous claims of error.

II. RELEASE AND WAIVER

The second franchise agreement executed by the parties in December of 1975 contained the following release:

> SIXTH: This Agreement terminates and supersedes all prior written or oral agreements, if any, between FDI and Dealer, and between Dealer and any former distributor of Fiat passenger cars, parts and products, relating to the subject matter hereof, except with respect to any trade indebtedness which may be owing to either FDI or Dealer to the other, and except that this Agreement shall not operate to cancel any of Dealer's unfilled orders with FDI for any Fiat passenger cars, parts and products placed with FDI pursuant to the provisions of any sales agreement terminated or superseded by this Agreement. Except as here inotherwise provided, upon execution of this Agreement and in consideration of the execution thereof by FDI, Dealer releases FDI from any and all claims, demands, contracts, and liabilities (including statutory liabilities) of any kind or nature whatsoever, arising from or out of or in connection with any such prior agreements.

Fiat Motors submits that this release should be construed as a matter of law to extinguish all of the claims raised by Gables and Rebhan. Thus it asserts that the trial court erred in submitting the case to the jury. On the other hand, Gables and Rebhan contend that the release was ineffective because of the alleged continuing fraud surrounding the execution of the second agreement and because the agreement was executed under duress.

[1-3] Although the laws concerning the construction of a general release are more or less uniform among the states, we must begin our analysis of this agreement by focusing on the appropriate state law to be applied. The agreement itself provides that it is to be "governed

by, and construed according to the laws of New York." In order to determine whether this choice of law provision is to be given effect, we look to the substantive laws, including the conflict of law rules, of the forum state, Florida. *E.g., Klaxton v. Stenor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Charles L. Bowman & Co. v. Erwin*, 468 F.2d 1293 (5th Cir. 1972). The parties' agreement as to which law shall govern the construction of a contract would be recognized under Florida law, unless the chosen law contravenes the public policy of Florida. *See, e.g., Wilkinson v. Manpower, Inc.*, 531 F.2d 712 (5th Cir. 1976); *Hirsch v. Hirsch*, 309 So.2d 47 (Fla.App. 1975); *Davis v. Ebsco Industries, Inc.*, 150 So.2d 460 (Fla.App. 1963); *cf. Boat Town U.S.A., Inc. v. Mercury Marine Division of Brunswick Corp.*, 364 So.2d 15 (Fla. App. 1978) (drawing a distinction between clauses which provide that contracts are to be interpreted according to, rather than governed by, the laws of another state). Since New York law concerning the scope and effect of general releases does not contravene any articulated public policy of Florida, we find that New York law should be applied to this franchise agreement.[3]

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[3]The appellees assert that Fiat Motors' failure to comply with Rule 44.1 of the Federal Rules of Civil Procedure precludes the application of New York law to this release. By its own terms, Rule 44.1 requires only that notice be given concerning the "law of a foreign country." Fed.Rules Civ.Proc. 44.1. Moreover, Fiat Motors relied on New York law in its original motion for summary judgment. Finally, we note that a federal court sitting in diversity is required to take judicial notice of the laws of every state. *See McCormick on Evidence* §335 (2d ed. 1972).

[4-8] Under New York the law construction of a general release is governed by principles of contract law and thus the intention of the parties is the controlling issue. *E.g., Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (2d Cir. 1965) (applying New York law); *Mangini v. McClurg*, 24 N.Y.2d 556, 249 N.E.2d 386, 301 N.Y.S.2d 508 (1969); *Mt. Read Terminal, Inc. v. LeChase Construction Corp.*, 58 A.D.2d 1034, 396 N.Y.S.2d 959 (1977). The scope of the release must of course be determined in the context of the particular controversy at issue.[4] Where the language of the general release is unmistakenly clear, however, the intent of the parties can often be discerned from the release itself. *E.g., In re Schaefer*, 18 N.Y.2d 314, 221 N.E.2d 538, 274 N.Y.S.2d 869 (1966); *Single v. Whitmore*, 307 N.Y. 575, 122 N.E.2d 918 (N.Y. 1954); *Powell v. Oman Construction Co.*, 25 A.D.2d 566, 267 N.Y.S.2d 862 (App.Div. 1966). Thus, unless fraud, duress or illegality is established, the language of a voluntary release will be given its full effect. *See Korn v. Franchard Corp.*, 388 F.Supp. 1326, 1328 n.3 (S.D.N.Y.1975); *Mangini v. McClurg, supra.*

[9] Subject to certain specified exceptions, the release provision in the instant case terminates all prior written or oral agreements which relate to the subject matter of the franchise. It then releases Fiat Motors from "any and all claims, demands, contracts, and liabilities . . . arising from or out of or in connection with any such prior agreements." It cannot

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[4]Under New York law, a general release may be raised as a defense to claims for both tort and contract liability. *See, e.g., Krichmar v. Krichmar*, 42 N.Y.2d 858, 366 N.E.2d 863, 397 N.Y.S.2d 775 (1977); *Mt. Read Terminal, Inc. v. LeChase Constr. Corp.*, 58 A.D.2d 1034, 396 N.E.2d 959 (1977).

seriously be disputed that the representations and promises allegedly made by Fiat Motors are related to the subject matter covered by this comprehensive franchise agreement.[5] Moreover, the record clearly indicates that all of the claims raised in this suit relate to the various oral and written agreements made in the summer of 1975, several months prior to the execution of the second franchise agreement which contained the release provision. If Appellee Gables had intended to reserve any of their claims against Fiat Motors, they should have added words of reservation. *In re Schaefer, supra.* Thus, when the particular language of the release is viewed in the context of the franchise relationship between the parties, we find that the release was sufficient to bar all of Appellee Gables claims.

[10] Appellee Gables contend, however, that they should be allowed to rescind the second franchise agreement because of the alleged continuing fraud perpetrated upon them at the time the agreement was executed. No independent fraudulent activities on the part of Fiat Motors are alleged to have occurred in December of 1975 when the agreement was executed. Rather, Appellee Gables base their claim of "continuing fraud" on the representations and promises made by Fiat Motors during the summer of 1975. Appellee Gables assert that since they did not realize the intentional nature of Fiat Motors' fraudulent conduct until March of 1976, their claims could not have effectively been released in December of 1975. It is clear, however, that

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[5]We note that the franchise agreement specifically covers advertising costs, payment schedules [illegible] parts, and releases Fiat Motors from any liability for expenditures [illegible]rred by the dealer in the performance of its contractual obligations.

the Appellee Gables must have been aware of the alleged misrepresentations concerning Gables' "replacement" status in July of 1975 when the protests were lodged. Indeed, Rebhan admitted as much in his testimony at trial. It is equally obvious that appellees could not have been reasonably relying upon Fiat Motors' alleged promises several months after the license was awarded when Fiat Motors had unequivocally indicated that its $30,000 payment was in full satisfaction of its promises and had imposed a specific schedule for monthly payments on parts thereafter.[6] In the absence of any allegation that Fiat Motors either renewed its old promises or made new ones at the time the second agreement was executed, we find no basis for Appellee Gables claim that the release was tainted by continuing fraud.

[11-13] Similarly, we are unable to conclude that the franchise agreement was the product of duress. Under New York law, a release is not voidable on grounds of economic duress unless it is shown that a threat was unlawfully made, causing an involuntary acceptance of the contract terms under circumstances where no alternative was available. Mere hard bargaining positions or the pressure of financial circumstances is not sufficient. *See, e.g., Gulf & Western Corp. v. Craftique Productions, Inc.*, 523 F.Supp. 603 (S.D.N.Y.1981); *Business Incentives Co., Inc. v. Sony Corp. of America*, 397 F.Supp. 63 (S.D.N.Y.1975); *Stewart M. Muller Construction Co. v. New York Telephone Co.*, 40 N.Y.2d 955, 359 N.E.2d

[6]Rebhan's testimony that he was unaware of the intentional nature of Fiat Motors' misrepresentation until March of 1976 is both contradictory and self-serving. Moreover, we find this testimony to be irrelevant under circumstances where promises were made and disavowed several months prior to the execution of the release.

328, 390 N.Y.S.2d 817 (1976). In the instant case, it was apparent to both parties from the time the original agreement was executed, that a renewal agreement would be forthcoming in December of 1975. While it is true that Appellee Gables would have been unable to continue receiving cars and parts if they had not signed the second agreement, this sort of allegation alone has uniformly been held insufficient to establish duress. *See, e.g., Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885 (3d Cir. 1975); *Kohen v. H.S. Crocker Co.*, 260 F.2d 790 (5th Cir. 1958); *La Beach v. Beatrice Foods Co.*, 461 F.Supp. 152 (S.D.N.Y.1978). 66 *Am.Jur.2d, Release* §26 (1973). To hold otherwise would be tantamount to finding that the mere renewal of a franchise agreement, under circumstances where a potential dispute between the parties exists, is sufficient to establish a claim of duress.

[14-16] Finally, we note that regardless of the effect of the release, an alternative basis for disposing of the Appellee Gables fraud claims is provided by Florida's common law of waiver. Under certain circumstances, Florida courts have found that claims based on fraud have been waived by the subsequent execution of an agreement respecting the same subject matter as the alleged fraudulent transaction. *See, e.g., Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142 (5th Cir. 1976); *Benn v. Key West Propane Gas Corp.*, 72 So.2d 910 (Fla.1954); *Harpold v. Stock*, 65 So.2d 477 (Fla.1953), 27 *Fla.Jur.2d, Fraud and Deceit* §81 (1981). As these cases make clear, however, waiver will not be found unless the defrauded party had actual or imputed knowledge of the facts constituting the alleged fraud at the time the subsequent agreement was made. *Bissett v. Ply-Gem Industries, Inc., supra.* For the reasons

previously described, we find that the Appellee Gables knew or should reasonably have known all the pertinent facts constituting the alleged fraudulent activities at the time the second franchise agreement was executed. Thus, we hold that the execution of the second franchise agreement amounted to a waiver of the Appellee Gables claims based on fraud.

CORAL GABLES IMPORTED MOTORCARS, INC., et al.,
Plaintiffs-Appellees,

v.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant-Appellant.

No. 80-5787.

United States Court of Appeals,
Eleventh Circuit.

July 9, 1982.

Appeal from the United States District Court for the Southern District of Florida.

Greenbaum, Wolff & Ernst, James M. Brachman, New York City, Woodrow M. Melvin, Miami, Fla., for defendant-appellant.

Lane, Mitchell & Harris, P. A., C. Robert Murray, Miami, Fla., for Coral Gables Imported Motor Cars, Inc. & Rebhan.

Before TUTTLE, KRAVITCH and JOHNSON, Circuit Judges.

On Petition for Rehearing

PER CURIAM:

In their petition for rehearing, appellees point out that we incorrectly refer to both appellees in our discussion of the release. Accordingly, we find that our original opinion, 673 F.2d 1234, should be modified as follows. The last sentence of the first paragraph should be deleted. All references to appellees in the first six paragraphs of Part II of the opinion are hereby changed to read "appellee Gables." The last paragraph of the opinion should be changed to read:

Because we hold that appellee Gables' claims were effectively precluded by the release and waiver, we REVERSE the judgment in the amount of $491,827.00 entered in favor of Gables. Because we hold that Rebhan waived his claim of fraudulent misrepresentation, we REVERSE the judgment in the amount of $100,001.00 entered in favor of Rebhan, and REMAND to the district court for proceedings consistent with this opinion.

[FILED AUG 23 1982]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5787

CORAL GABLES IMPORTED
MOTORCARS, INC., Et. Al.,
Plaintiffs-Appellees,

versus

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
as to rehearing opinion 7/9/82

Before TUTTLE, KRAVITCH and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

APPENDIX B

COMPLAINT FOR:
FRAUD AND DECEIT;
BREACH OF CONTRACT;
PROMISSORY ESTOPPEL.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No.

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation, and CHARLES M. REBHAN, individually,

Plaintiffs,

vs.

FIAT DISTRIBUTORS, INC., a New York corporation,

Defendant.

COUNT I

FRAUD AND DECEIT

COME NOW the Plaintiffs, CORAL GABLES IMPORTED MOTORCARS, INC., and CHARLES M. REBHAN, by and through their undersigned counsel, and sue Defendant, FIAT DISTRIBUTORS, INC., and allege:

1. This is an action for fraud and deceit by and against FIAT DISTRIBUTORS, INC., with resultant damages in excess of $2500.

2. That Defendant, FIAT DISTRIBUTORS, INC. (hereinafter referred to as "FIAT") is a New York corporation licensed to do business in the State of Florida, and is conducting business in Dade County, Florida.

3. That Plaintiff, CORAL GABLES IMPORTED MOTORCARS, INC. (hereinafter referred to as "GABLES") is a Florida corporation licensed to do business in the State of Florida, conducting business in Dade County, Florida.

4. That the Plaintiff, CHARLES M. REBHAN (hereinafter referred to as "REBHAN"), is over 18 years of age, and a resident of Dade County, Florida.

5. Plaintiffs are entitled to relief against Defendant FIAT upon the following facts:

(a) That in March and/or early April, 1975, Plaintiff REBHAN, and/or his agents, approached FIAT regarding the franchise of a Fiat Dealership in the Greater Miami Area.

(b) That upon inquiry, Plaintiff REBHAN and/or his agents, were referred to MR. WILLIAM BARTLETT, Zone Sales Manager of Defendant FIAT. After conferring with the Plaintiff REBHAN, MR. BARTLETT expressed enthusiasm regarding the potential franchise and related that Defendant FIAT had an "Open Point" in the Coral Gables area.

(c) That shortly thereafter, Defendant FIAT representatives visited Miami and inquired of the proposed location. After seeing the site, Defendant FIAT representatives expressed further enthusiasm, stating that it was exactly what they had in mind. Defendant FIAT then immediately delivered the Franchise Application for Plaintiff REBHAN's signature.

(d) That after seeing the proposed location, Defendant FIAT representatives again reiterated that Coral Gables was an "Open Point" due to the fact that Defendant FIAT's prior Coral Gables franchise (ORANGE MOTORS OF CORAL GABLES, INC.) had been discontinued.

(e) That in reliance upon the representations above mentioned, made by Defendant FIAT, Plaintiff REBHAN did cause to be formed and incorporated CORAL GABLES IMPORTED MOTORCARS, INC., on May 22, 1975. The purpose for forming said Corporation being that CORAL GABLES IMPORTED MOTORCARS, INC. would be the legal entity for the Franchise.

(f) That FIAT by its agents, directed that the name "CORAL GABLES IMPORTED MOTORCARS, INC." be the franchise name since CORAL GABLES IMPORTED MOTORCARS, INC. was the "Replacement Dealer" for ORANGE MOTORS OF CORAL GABLES, INC.

(g) That at all times material hereto, Defendant FIAT had knowledge of Florida Statute 320.642, which states as follows:

320.642 DEALER LICENSES IN AREAS PREVIOUSLY SERVED

The department shall deny an application for a motor vehicle dealer license in any community or territory where the licensee's presently licensed franchised motor vehicle dealer or dealers have complied with licensee's agreements and are providing adequate representation in the community or territory for such licensee. The burden of proof in showing inadequate representation shall be on the licensee.

(h) That on numerous occasions Plaintiff REBHAN, prior to June, 1975, inquired of Defendant FIAT whether a "Protest Situation" would be encountered upon application for licensing, with the State of Florida, as a Fiat Dealer in the Coral Gables area. In response to all inquiries, Agents of FIAT distinctly stated and represented that no such "protest" situation existed because GABLES was a "Replacement Dealer".

(i) That in March, April, May and June of 1975, representatives and agents of Defendant FIAT made representations to Plaintiff REBHAN and GABLES that the licensing of the Dealership had already been approved with The Honorable JOHN D. CALVIN, Director of Division of Motor Vehicles, for the State of Florida. Representations were made that Defendant FIAT, by and through its agents, MR. BARTLETT and MR. PHILBROOK, had contacted MR. CALVIN of the Division of Motor Vehicles with the State of Florida, and personally received the licensing approval, as a "Replacement Dealer".

(j) That in May, 1975 MR. NELSON, MR. PHILBROOK and MR. BARTLETT, agents of Defendant FIAT, came to the Miami area to speak with Plaintiff REBHAN. Prior to the meeting, NELSON, PHILBROOK and BARTLETT met with MR. AQUILLAR, of AUTORICO, INC. (another Fiat Dealer in Miami) to supposedly smooth over the fact that Plaintiffs REBHAN and GABLES were being awarded the franchise. After their meeting with AQUILLAR, NELSON, PHILBROOK and BARTLETT stated to Plaintiff REBHAN and others that AQUILLAR was not pleased, but that it didn't really matter because GABLES was still in the status of a "Replacement Dealer", and thus would not need the cooperation of AUTORICO to obtain licensing.

(k) That the aforesaid representations were continually made by FIAT representatives from Plaintiff REBHAN's initial contact with Defendant FIAT until "protest" letters were filed with the Department of Highway Safety and Motor Vehicles for the State of Florida, by the two existing Fiat Dealers of Dade County.

(l) That as a result of and in reliance upon the aforesaid representations of Defendant FIAT, by and through its President, Plaintiff REBHAN, entered into a "dealer sales and service agreement" (Franchise Agreement) on June 23, 1975.

(m) That in reliance upon Defendant FIAT's representations, Plaintiff REBHAN entered into a long-term lease agreement for the subject franchise location on Coral Way, Miami, which Lease Agreement legally binds and obligates Plaintiff REBHAN for the sum of $817,200 plus real estate taxes of approximately $130,000.

(n) That after entering into the subject Lease Agreement, and in reliance upon the representations of Defendant FIAT, Plaintiffs REBHAN and/or GABLES expended large sums of money on remodeling, redecorating, purchasing of equipment, clean-up, training of personnel, and other activities incident to the opening of the Dealership.

(o) That the representations made by Defendant FIAT to Plaintiffs REBHAN and/or GABLES were known by Defendant FIAT to be false, or through the exercise of due diligence, should have been known to be false due to the following:

(1) That when ORANGE MOTORS OF MIAMI, INC. and ORANGE MOTORS OF CORAL GABLES, INC. (two separate corporations) discontinued their Fiat Lines, two "Open Points" emerged for Fiat Dealers in the Dade County area as "Replacement Dealers".

(2) That these two "Open Points" were awarded, or were in the process of being awarded by Defendant FIAT to AUTORICO, INC. and HEBERT OLDS (hereinafter referred to as "HEBERT") in Dade County, prior to March or April, 1975.

(3) That AUTORICO and HEBERT had discussed their Franchise Agreements and were processing their applications prior to Plaintiff REBHAN entering into the Lease Agreement and prior to other expenditures made by

Plaintiffs REBHAN and/or GABLES, referred to above.

(4) That prior to the execution of the sales and service agreement of GABLES with Defendant FIAT, FIAT had already entered into Dealer's sales and service agreements with HEBERT and AUTORICO, thereby extinguishing the "Open Points" available in Dade County, all said facts being unknown to Plaintiffs.

(5) That the elimination of the "Open Points", referred to above, made Plaintiff GABLES subject to a "Protest Letter" situation, notwithstanding FIAT's representations to the contrary to Plaintiff GABLES or its agents.

(6) That Plaintiffs were unaware of a "Protest Situation" until they received correspondence from the Department of Highway Safety and Motor Vehicles indicating such in mid-July, 1975.

(p) That a time period of approximately five and one-half months elapsed between the time Defendant FIAT represented that the Fiat Dealer's License was approved, and the time the license was in fact approved by the State of Florida.

(q) That the representations, as aforesaid, were in truth and fact, false.

(r) That at all times material hereto Defendant FIAT stood in a fiduciary capacity to Plaintiffs REBHAN

and GABLES, whereby Plaintiffs did repose trust and confidence in the statements and representations of Defendant.

(s) That Plaintiffs REBHAN and GABLES relied upon the truthfulness and correctness of the representations made by Defendant FIAT, and in reliance thereon expended large sums of money to the detriment of both Plaintiffs.

(t) That said representations were made for the purpose of inducing Plaintiffs REBHAN and/or GABLES to act in reliance thereon, including but not be limited to the entering into a long-term lease contract and the attendant expenditures needed for the Franchise.

(u) That as a proximate cause of the fraudulent representations of Defendant FIAT, Plaintiffs have suffered to their detriment.

6. That at all times material hereto BARTLETT, PHILBROOK, NELSON, and others, were acting within the scope and purpose of their employment with Defendant FIAT.

7. That Defendant FIAT's misrepresentations did proximately cause Plaintiffs to incur the following damages:

(a) The expenses incident to the incorporation and maintenance of CORAL GABLES IMPORTED MOTORCARS, INC.

(b) To enter into and become obligated upon a lease for real property in a total sum of approximately $947,200.

(c) Expenditure of monies upon redecorating, remodeling, purchase of equipment, general cleanup, training of sales force.

(d) Loss of personnel.

(e) Costs and attorney's fees incident to the licensing hearing to obtain the Fiat Dealer's License.

(f) Under-capitalization of Plaintiff GABLES and incident damages thereto.

(g) Lack of appropriate advertising.

(h) Lack of funds for used-car operation.

(i) Loss of profits.

(j) Lost wages of Plaintiff REBHAN.

(k) Damage to the financial reputation of Plaintiff REBHAN in the community.

(l) Caused Plaintiff GABLES to be unable to meet its debt obligations on a timely basis.

(m) Damage to the financial reputation of Plaintiff GABLES.

(n) Other damages incident thereto.

WHEREFORE, Plaintiffs demand judgment against Defendant FIAT in an amount in excess of $5,000,000 compensatory damages, $10,000,000 punitive damages, costs, and Plaintiffs further demand trial by jury.

COUNT II

BREACH OF CONTRACT

COME NOW the Plaintiffs by and through their undersigned counsel, and sue Defendant FIAT DISTRIBUTORS, INC., and allege:

8. Plaintiffs hereby reallege and incorporate by reference herein, Paragraphs 2, 3, 4 and 5 of Count I, the same as if set forth herein in full.

9. This is an action for breach of contract with resultant damages in excess of $2500.

10. The Plaintiffs are entitled to relief against Defendant FIAT upon the following facts:

(a) That after Plaintiffs GABLES and REBHAN had incurred damages and expended monies as referred to in Count I herein, MR. D. E. MANNING, President of FIAT, and by and on its behalf, contacted Plaintiff REBHAN and apologized for the "protest" situation, which had not been previously revealed to Plaintiff GABLES or REBHAN, by Defendant FIAT.

(b) That during said conversation, which occurred in July, 1975, MANNING became aware of the fact that Plaintiff GABLES was contemplating "closing up"

due to the "protest" situation that had developed, which had prevented the licensing of GABLES as a Fiat Franchise, and due to the resultant burdensome expenses.

(c) That during the subject conversation Defendant FIAT contracted with Plaintiffs REBHAN and GABLES for Defendant FIAT to pay all losses incurred by Plaintiffs REBHAN and GABLES incurred incident to the operation of the Franchise, until such time as the Dealer's License was issued to Plaintiff GABLES by the Department of Highway Safety & Motor Vehicles of the State of Florida. This contract was made in consideration of Plaintiff GABLES staying in business during the time period necessary to have the licensing hearing in Tallahassee, Florida.

(d) That at all times material hereto Plaintiff REBHAN was a third party beneficiary to said contract.

(e) That the situs and place of performance of the subject contract was in Dade County, Florida.

(f) That Plaintiff GABLES has performed all conditions precedent to the contract and has made demand upon Defendant FIAT for payment of said losses.

(g) That on November 3, 1975, the Department of Highway Safety & Motor Vehicles issued a Dealer's License to Plaintiff GABLES as an authorized Fiat Dealer for the Greater Miami Area.

(h) That Defendant FIAT has failed and refused to pay said losses and, as a result thereof, has breached the subject contract.

11. That at all times material hereto, Defendant FIAT stood in a fiduciary capacity to Plaintiffs REBHAN and GABLES, whereby Plaintiffs did repose trust and confidence in the statements and representations of Defendant.

12. That as a direct and proximate result of the breach of said contract by Defendant FIAT, Plaintiff GABLES and Plaintiff REBHAN have suffered to their detriment.

13. That as a result of Defendant's breach, Plaintiffs have suffered the following damages:

(a) Expenditure of monies upon redecorating, remodeling, purchase of equipment, general cleanup, training of sales force.

(b) Loss of personnel.

(c) Costs and attorney's fees incident to the licensing hearing to obtain the Fiat Dealer's License.

(d) Under-capitalization of Plaintiff GABLES and incident damages.

(e) Lack of appropriate advertising.

(f) Lack of funds for used-car operation.

(g) Loss of profits.

(h) Lost wages of Plaintiff REBHAN.

(i) Damage to the financial reputation of Plaintiff REBHAN in the community.

(j) Caused Plaintiff GABLES to be unable to meet its debt obligations on a timely basis.

(k) Damage to the financial reputation of Plaintiff GABLES.

(l) Other damages incident thereto.

WHEREFORE, Plaintiffs demand judgment against Defendant FIAT in an amount in excess of $5,000,000 compensatory damages, $10,000,000 punitive damages, costs, and Plaintiffs further demand trial by jury.

COUNT III

CAUSE OF ACTION BASED UPON PROMISSORY ESTOPPEL AND DETRIMENT RELIANCE

COME NOW the Plaintiffs by and through their undersigned counsel, and sue Defendant FIAT DISTRIBUTORS, INC., and allege:

14. That Plaintiffs hereby reallege and incorporate by reference herein Paragraphs 2, 3, 4 and 5 of Count I, and 10, 11, 12 and 13 of Count II, the same as if set forth herein in full.

15. That this is an action based upon promissory estoppel with resultant damages in excess of $2500.

16. That the Plaintiffs are entitled to relief against Defendant FIAT upon the following facts:

(a) That in March and/or April, 1975, Plaintiff REBHAN and/or his agents, contacted Defendant FIAT regarding the potential franchising of a Fiat Dealership in the Miami area.

(b) That upon contact with Defendant FIAT, Plaintiff REBHAN was referred to MR. WILLIAM BARTLETT, Zone Sales Manager of FIAT. BARTLETT responded immediately stating that FIAT had an "Open Point" in the Coral Gables area.

(c) That following contact with BARTLETT, Defendant FIAT inquired of the proposed location for the Dealership, and soon thereafter, sent FIAT representatives to the Miami area for personal inspection of the proposed franchise site.

(d) After seeing the proposed location, Defendant FIAT became very enthusiastic regarding the franchise and in fact delivered a Franchise Application for signature.

(e) Prior to and subsequent to execution of the Dealership Franchise Application inquiries were made by Plaintiff REBHAN and others regarding any potential difficulty of licensing the proposed location with the Department of Highway Safety & Motor Vehicles of the State of Florida. Defendant FIAT represented that the Coral Gables area was an "Open Point" and that all licensing had already been taken care of by FIAT with the State of Florida, as a "Replacement Dealer".

(f) That Plaintiff REBHAN inquired whether a "Protest Letter" situation would be encountered upon Plaintiff GABLES' Application for a Fiat Dealer's License. Plaintiff REBHAN was assured on several occasions prior to entering into the Franchise Agreement, and subsequent thereto, by Defendant FIAT, through its representatives and agents, that the licensing of the Dealership had already been approved with The Honorable JOHN D. CALVIN, Director of Division of Motor Vehicles, for the State of Florida. Representations were made that Defendant FIAT, by and through its agents, MR. BARTLETT and MR. PHILBROOK, had contacted MR. JOHN D. CALVIN and personally received the licensing approval, as a "Replacement Dealer."

(g) That as a result of and in reliance upon the aforesaid representations of Defendant FIAT, Plaintiff GABLES, by and through its President, Plaintiff REBHAN, entered into a "Dealer's Sales and Service Agreement (Franchise Agreement) on June 23, 1975.

(h) That as a proximate cause of these representations Plaintiff REBHAN then formed the Florida corporation, CORAL GABLES IMPORTED MOTORCARS, INC. on May 22, 1975, for the purpose of being the legal entity of the Dealership, and entered into a "Dealer's Sales and Service Agreement" (Franchise Agreement) on June 23, 1975.

(i) That the above mentioned representations were made on several occasions by Defendant FIAT representatives and were intended by FIAT to induce Plaintiff REBHAN and/or GABLES to enter into a long-term lease agreement and to make the incident

expenditures needed for the proposed location on Coral Way, Miami.

(j) That the representations, referred to above, made by Defendant FIAT to Plaintiffs REBHAN and GABLES were made in Dade County, Florida.

(k) That Plaintiff REBHAN, in reliance upon the statements and representations of Defendant FIAT, did in fact, enter into a long-term lease agreement for the proposed location, and is legally obligated thereon for a sum of approximately $970,000.

(l) That Plaintiff REBHAN and/or GABLES, in reliance upon the statements and representations of Defendant FIAT, did in fact, expend sums of money on remodeling, redecorating, purchasing of equipment, general clean-up, training of a sales force, and other activities incident to the Dealership.

(m) That Defendant FIAT is promissorily estopped from denying the detrimental reliance of Plaintiffs upon the representations of Defendant.

17. That as a result of Defendant's actions, Plaintiffs have suffered the following damages:

(a) The expenses incident to the incorporation and maintenance of CORAL GABLES IMPORTED MOTORCARS, INC.

(b) To enter into and become obligated upon a lease for real property in a total sum of approximately $947,200.

(c) Expenditure of monies upon redecorating, remodeling, purchase of equipment, general cleanup, training of sales force.

(d) Loss of personnel.

(e) Costs and attorney's fees incident to the licensing hearing to obtain the Fiat Dealer's License.

(f) Under-capitalization of Plaintiff GABLES and incident damages thereto.

(g) Lack of appropriate advertising.

(h) Lack of funds for used-car operation.

(i) Loss of profits.

(j) Lost wages of Plaintiff REBHAN.

(k) Damage to the financial reputation of Plaintiff REBHAN in the community.

(l) Caused Plaintiff GABLES to be unable to meet its debt obligations on a timely basis.

(m) Damage to the financial reputation of Plaintiff GABLES.

(n) Other damages incident thereto.

WHEREFORE, Plaintiffs demand judgment against Defendant FIAT in an amount in excess of $5,000,000 compensatory damages, $10,000,000 punitive damages,

costs, attorney's fees, and Plaintiffs further demand trial by jury.

Dated at Miami, Florida, this 3rd day of March, 1976.

/s/ Charles Michael Hartz
/s/ CHARLES MICHAEL HARTZ

LAW FIRM OF
WILLIAM P. HARRIS, JR.
475 Biltmore Way, Suite 303
Coral Gables, Florida 33134
Telephone: (305) 446-4409

COUNT IV

NEGLIGENCE

COME NOW the Plaintiffs by and through their undersigned counsel, and sue Defendant, FIAT DISTRIBUTORS, INC., and allege:

1. Plaintiffs hereby incorporate by reference herein Counts I through III hereof as if more specifically set out herein.

2. That in April or May, 1975, FIAT representatives and agents contacted JOHN CALVIN, Director of the Department of Highway Safety and Motor Vehicles for the State of Florida, regarding the licensing of Plaintiff, CORAL GABLES IMPORTED MOTORCARS, INC. as a "replacement dealer" for ORANGE MOTORS OF CORAL GABLES and/or ORANGE MOTORS OF MIAMI.

3. During said conversation, which is referred to above, between MR. JOHN CALVIN and the agents of FIAT, MR. CALVIN reportedly told representatives and agents of Defendant FIAT that CORAL GABLES IMPORTED MOTORCARS was in the status of a "replacement dealer" for ORANGE MOTORS OF CORAL GABLES and/or ORANGE MOTORS OF MIAMI, and thus "no protest" letters would not be needed from FIAT dealers in the same territory to insure CORAL GABLES IMPORTED MOTORCARS a license as a FIAT dealer.

4. That agents and representatives of FIAT then related the statements and assurances made by JOHN CALVIN that CORAL GABLES IMPORTED MOTORCARS was in fact a "replacement dealer" for ORANGE MOTORS OF MIAMI and/or ORANGE MOTORS OF CORAL GABLES, to the Plaintiffs.

5. That Defendant FIAT representatives, agents, or employees negligently and willfully failed to disclose pertinent information to JOHN CALVIN regarding the "replacement dealers" already in existence for ORANGE MOTORS OF CORAL GABLES and ORANGE MOTORS OF MIAMI.

6. That if agents, employees or representatives of FIAT had disclosed the "replacement dealer" status of HEBERT OLDS and/or AUTORICO to MR. CALVIN, MR. CALVIN would not have suggested, assured or represented that CORAL GABLES IMPORTED MOTORCARS was a "replacement dealer" for either ORANGE MOTORS OF MIAMI or ORANGE MOTORS OF CORAL GABLES.

7. That the representatives of FIAT had a duty to Plaintiffs to fully disclose all pertinent facts and circumstances regarding HEBERT OLDS and AUTORICO and their "replacement dealer" status to JOHN CALVIN, Director of the Department of Highway Safety and Motor Vehicles for the State of Florida.

8. That Defendant FIAT had knowledge of the "replacement dealer" status of HEBERT OLDS and/or AUTORICO, which it knew or should have known would materially affect the decision of MR. CALVIN if disclosed to him

9. That Defendant FIAT willfully and/or negligently failed to disclose said facts to JOHN CALVIN in breach of its duty to the Plaintiffs.

10. That as a direct and proximate result of the grossly willful negligence of Defendant in not relating correct, accurate and material information to JOHN CALVIN, Plaintiffs were damaged to their detriment.

WHEREFORE, Plaintiffs hereby demand judgment against the Defendant for $5,000,000 compensatory damages and $10,000,000 punitive damages.

HARRIS & HARTZ
Attorneys for Plaintiffs
475 Biltmore Way, Suite 303
Coral Gables, Florida 33134

By /s/ Charles Michael Hartz
Charles Michael Hartz

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No. 76-7114

Division 23

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED, a foreign corporation,
Defendant.

ANSWER

FIAT DISTRIBUTORS, INCORPORATED, Defendant, for its Answer to the Complaint, says and alleges that:

1. Paragraph 1 of Count I is denied.

2. Defendant admits the allegations in paragraphs 2, 3 and 4.

3. All other allegations of the Complaint not herein specifically admitted are denied.

AFFIRMATIVE DEFENSES

As and for Affirmative Defenses to the claims asserted herein, Defendant says and alleges that:

A. Plaintiffs' claims are barred by reason of the Statute of Frauds.

B. There was an accord and satisfaction between the parties.

C. There was a novation.

D. Plaintiffs are estopped to assert the claims herein sued upon.

E. There has been a waiver by Plaintiffs in respect of the claims sued upon.

COUNTERCLAIM

FIAT DISTRIBUTORS, INCORPORATED, Counterclaimant, for its Counterclaim against CORAL GABLES IMPORTED MOTORCARS, INC. and CHARLES M. REBHAN, says and alleges that:

1. Counterdefendants promised to pay various and certain sums of monies to defendant by virtue of defendant franchising Coral Gables Imported Motorcars, Inc. as a franchised dealer in Fiat automobiles.

2. Defendant fully performed all of its duties in respect of its aforesaid agreement.

3. By virtue of the above, there is due and owing from Counterdefendants to Counterplaintiff a sum in excess of $10,000.

WHEREFORE, Counterclaimant demands judgment against Counterdefendants, jointly and severally in an amount in excess of $10,000.

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 26th day of March, 1976 to Charles Michael Hartz, Esquire, Law Office of William P. Harris, Jr., Attorneys for Plaintiffs, 475 Biltmore Way, Coral Gables, Florida, 33134.

FOWLER, WHITE, BURNETT,
HURLEY, BANICK AND
KNIGHT, P.A.
Attorneys for Defendant
Fifth Floor
City National Bank Building
25 West Flagler Street
Miami, Florida, 33130
Telephone 358-6550

By /s/ Harold L. Ward
Harold L. Ward

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575 - Civ - JLK

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation, et al.,

Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED, a foreign corporation,

Defendant.

PLAINTIFFS' ANSWER TO DEFENDANT'S COUNTERCLAIM AND AFFIRMATIVE DEFENSES

COME NOW the Plaintiffs, CORAL GABLES IMPORTED MOTORCARS, INC., and CHARLES M. REBHAN, by and through their counsel, and as their Answer to the Counterclaim filed by Defendant, FIAT DISTRIBUTORS, INCORPORATED, say and allege that:

1. Paragraphs 1, 2 and 3 of Defendant's Counterclaim are hereby denied, and Plaintiffs demand strict proof thereof.

2. All the allegations of the Counterclaim not herein specifically admitted are denied.

AFFIRMATIVE DEFENSES

Plaintiffs hereby assert as affirmative defenses to the Counterclaim of Defendant, FIAT DISTRIBUTORS, INCORPORATED, the following:

1. That Defendant has not performed all conditions precedent.

2. That Defendant has not made demand on Plaintiff-Counterdefendants for payment of said sums.

3. That Plaintiff-Counterdefendants have never entered into an agreement or promise to pay various and certain sums of money to the Defendant by virtue of the Defendant franchising Plaintiff CORAL GABLES IMPORTED MOTORCARS, INC., as a franchised dealer in the State of Florida.

4. That Defendant, Counterplaintiff fraudulently induced Plaintiff, Counterdefendants into entering into any such agreement or promise.

5. That there was a mutual mistake between the parties.

6. That there was a lack of consideration from the Defendant, Counterplaintiff.

WHEREFORE, the Plaintiff-Counterdefendants pray for a dismissal of the Counterclaim filed by Defendant, Counterplaintiffs.

I HEREBY CERTIFY that a true copy of the foregoing Answer of Plaintiffs to Defendant's

Counterclaim and Affirmative Defenses was mailed this 9th day of April, 1976, to HAROLD L. WARD, ESQ., Fowler, White, Burnett, Hurley, Banick & Knight, P.A., 5th Floor, City National Bank Building, Miami, Florida, 33130.

/s/ Charles Michael Hartz

CHARLES MICHAEL HARTZ
LAW FIRM OF
WILLIAM P. HARRIS, JR.
Attorneys for Plaintiffs
475 Biltmore Way, Suite 303
Coral Gables, Florida 33134
446-4409

CMH:dc
4/9/76

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575-Civ-JLK

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED, a foreign corporation,
Defendant.

AMENDMENT TO ANSWER

Defendant, with leave of Court, hereby amends its Affirmative Defenses in this cause by adding thereto the following:

1. Want of Consideration
2. Ratification.

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 23rd day of June, 1976 to Charles Michael Hartz, Esquire, Harris and Hartz, 475 Biltmore Way, Coral Gables, Florida, 33134.

FOWLER, WHITE, BURNETT, HURLEY, BANICK AND KNIGHT, P.A.
Attorneys for Defendant
Fifth Floor
City National Bank Building
25 West Flagler Street
Miami, Florida, 33130
Telephone: 358-6550
By /s Harold L. Ward
Harold L. Ward

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575-Civ-JLK

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED,
Defendant.

SECOND AMENDMENT TO ANSWER

Defendant, with leave of Court, hereby further amends its Affirmative Defenses in this cause by adding the additional Affirmative Defenses as follows: Release by virtue of paragraph Sixth of the second Franchise Agreement entered into by these parties.

FOWLER, WHITE, BURNETT, HURLEY, BANICK AND KNIGHT, P.A.
Attorneys for Defendant
Fifth Floor
City National Bank Building
25 West Flagler Street
Miami, Florida, 33130
Telephone: 358-6550

By /s Harold L. Ward
Harold L. Ward

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575-Civ-JLK

CORAL GABLES IMPORTED MOTORCARS, INC., et al.,

Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S AFFIRMATIVE DEFENSES

COME NOW the Plaintiffs by and through their undersigned counsel, and file this reply to the affirmative defenses filed herein by the Defendant, and do state:

1. Plaintiffs deny that there has been an accord and satisfaction between the parties, and demand strict proof thereof.

2. Plaintiffs deny that their claim is barred by reason of the Statute of Frauds, and demand strict proof thereof.

3. Plaintiffs deny that there has been a novation between the parties, and demand strict proof thereof.

4. Plaintiffs hereby deny that they are estopped to assert the claims sued upon, and demand strict proof thereof.

5. Plaintiffs deny a want or failure of consideration on the part of Plaintiffs, and demand strict proof thereof.

6. Plaintiffs deny that there has been a ratification of any agreement, etc., relating to the subject matter sued upon, and demand strict proof thereof.

I HEREBY CERTIFY that a true copy of the foregoing Response to Defendant's Affirmative Defenses, was mailed this 21st day of July, 1976, to Harold L. Ward, Esq., Attorney for Defendant, Fifth Floor City National Bank Building, Miami, Florida 33130.

/s/ Charles Michael Hartz

HARRIS & HARTZ
Attorneys for Plaintiffs
475 Biltmore Way, Suite 303

[RECEIVED SEP 26 1977]

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575-Civ-SMA

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT DISTRIBUTORS, INCORPORATED,
Defendant.

ANSWER AND AFFIRMATIVE DEFENSES TO COUNT IV OF THE COMPLAINT

Defendant, for its Answer to Count IV of the Complaint, says and alleges that:

1. As to paragraph 1 of Count IV, defendant re-alleges its answer and affirmative defenses previously pleaded.

2. Paragraph 2 is admitted to the extent that it is alleged there was a communication between defendant and John Calvin concerning the licensing of plaintiff corporation as a dealer for defendant; all other allegations not specifically admitted are denied.

3. Paragraph 3 is admitted to the extent that it alleges that Calvin assured defendant that "protest" letters would be neither solicited nor entertained by

Calvin's department because in Calvin's view plaintiff corporation was a replacement dealer; all other allegations not admitted are hereby denied.

4. Paragraph 4 is admitted; but defendant, further answering, says and alleges that plaintiffs were repeatedly cautioned by defendant that another Fiat dealer had announced he intended to do all he could to prevent plaintiff corporation being licensed as a Fiat dealer; that no one could be certain that protest letters might not be submitted and, if submitted, entertained by the Department of Motor Vehicles; and that plaintiffs assured defendant they had no concern about being routinely and promptly licensed because of their relationship and acquaintance with the local representatives of the Department.

5. Paragraph 5 is denied.

6. Paragraph 6 is denied.

7. Paragraph 7 is denied; furthermore, defendant states that all pertinent facts and circumstances were disclosed.

8. Paragraph 8 is denied in all respects, including but not limited to the assertion that Hebert and/or Autorico were "replacement dealers" for Orange Motors of Coral Gables.

9. Paragraph 9 is denied.

10. Paragraph 10 is denied.

AS AND FOR ITS AFFIRMATIVE DEFENSES, DEFENDANT SAYS AND ALLEGES THAT:

A. There was an accord and satisfaction between the parties;

B. Plaintiffs are guilty of assumption of the risk;

C. Plaintiffs are guilty of contributory negligence and/or comparative negligence;

D. Plaintiffs damages, if any, are the result of avoidable consequences;

E. Plaintiffs failed to adequately and properly mitigate the damages;

F. Plaintiffs are estopped to seek the recovery sought herein;

G. Plaintiffs have released defendant from liability for any of the claims herein asserted;

H. Plaintiffs have waived the claims herein raised.

I HEREBY CERTIFY that a true copy of the above and foregoing was mailed this 23rd day of September, 1977 to Charles Michael Hartz, Esquire, Attorney for Plaintiffs, Dixon, Dixon, Lane, Mitchell &

Harris, 900 Security Trust Building, 700 Brickell Avenue, Miami, Florida, 33131.

FOWLER, WHITE, BURNETT, HURLEY, BANICK AND KNIGHT, P.A.
Attorneys for Defendant
Fifth Floor
City National Bank Building
25 West Flagler Street
Miami, Florida, 33130
Telephone: 358-6550
By /s Harold L. Ward
Harold L. Ward

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 76-575-Civ-JLK

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT DISTRIBUTORS, INC.,
a foreign corporation,
Defendant.

REPLY TO AFFIRMATIVE DEFENSES

Plaintiffs, CORAL GABLES IMPORTED MOTORCARS, INC. and CHARLES M. REBHAN, by and through their undersigned counsel, as and for a reply to the affirmative defenses of the Defendant, state:

1. That the second franchise agreement "Sales and Service Agreement" entered into by FIAT and Plaintiff CORAL GABLES IMPORTED MOTORCARS, INC., on or about January 14, 1976, was an adhesion contract and the Defendant was guilty of over-reaching in its dealings with CORAL GABLES IMPORTED MOTORCARS, INC., due to its superior finances, market leverage, and control of Plaintiff corporation.

2. That said second franchise agreement "Sales and Service Agreement" was entered into as a result of the mutual mistake of the parties.

3. That the contents of said franchise agreement "Sales and Service Agreement" were misrepresented to the Plaintiff corporation prior to its execution and that Plaintiff was not represented by counsel during said negotiations and was not sufficiently apprised of the contents of said agreement or its potential effect upon the claims pending which were eventually contained within the instant lawsuit and which constituted the causes of action herein.

4. That the Plaintiff corporation was under duress exerted by the Defendant prior to and at the execution of the second franchise agreement "Sales and Service Agreement" hereinabove referred to.

IT IS HEREBY CERTIFIED that a true copy of the foregoing Reply to Affirmative Defenses was hand delivered to Harold L. Ward, Esq., attorney for Defendant, City National Bank Building, 25 W. Flagler Street, Miami, Florida, this 2d day of September, 1976.

HARRIS & HARTZ
Attorneys for Plaintiffs
475 Biltmore Way, Suite 303
Coral Gables, Florida 33134

By s/
C. Robert Murray, Jr.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO: 76-575 - Civ SMA

CORAL GABLES IMPORTED MOTORCARS, INC., a Florida corporation, and CHARLES M. REBHAN,
Plaintiffs,

v.

FIAT DISTRIBUTORS, INC.,
Defendants

RESPONSE TO AFFIRMATIVE DEFENSES

COME NOW, the Plaintiffs, by and through their undersigned counsel and respond to the affirmative defenses to Count IV of the Complaint and state as follows:

1 a. Denied

2 b. Denied

4 d. Denied

5 e. Denied

6 f. Denied

7 g. Denied

8 h. Denied

WE HEREBY CERTIFY that a true and correct copy of the foregoing Response to Affirmative Defenses was mailed this 28th day of September, 1977, to: Harold L. Ward, Esq. 5th Floor, City National Bank Building, Miami, Florida 33130.

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APPENDIX C

[RECEIVED SEP 2 1980]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-575-Civ-SMA

CORAL GABLES IMPORTED MOTORCARS, INC., and CHARLES M. REBHAN,
Plaintiffs,

vs.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant.

ORDER ON POST-TRIAL MOTIONS

THIS CAUSE came before the Court upon the following motions of the parties:

1. Defendant's Motion for Judgment Notwithstanding the Verdict and Alternatively Motion for New Trial;

2. Plaintiff's Motion to Review Taxation of Costs;

3. Defendant's Cross-Motion to Review Taxation of Costs.

The Court, having considered said motions and the parties supporting and opposing memoranda, having heard argument of counsel, and having reviewed the

record and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Judgment N.O.V. or, alternatively, for a New Trial is DENIED. After considering the evidence in the light most favorable to the Plaintiffs, *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969), the Court finds that Defendant is not entitled to judgment as a matter of law. As to the motion for a new trial, the Court finds that the jury's verdict was supported by the manifest weight of the evidence, and that there were no errors committed during the trial that would warrant a new trial.

Defendant has raised several alleged errors in the Court's charge to the jury. Even if the Court were to accept the Defendant's contentions as to these errors, the Court finds that such errors would be harmless and would not have any effect on the verdict of the jury. *See also* Fed.R.Civ.P. 51; trial transcript at 1706-07.

2. Plaintiff's Motion to Review Taxation of Costs is DENIED. The provision allowing expert witness fees in Florida, Fla.Stat. §92.231(2), does not convey a substantive right in a diversity action for breach of contract and tort. *Compare Henning v. Lake Charles Harbor and Terminal District*, 387 F.2d 264 (5th Cir. 1968). Since the provision for expert witness fees under Florida law is a procedural matter, it is inapplicable in federal court. *See Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

3. Defendant's Cross-Motion to Review Taxation of Costs is GRANTED, and the $1300.00 figure referred to in Defendant's motion is reduced to $346.00. However, Plaintiffs may, within ten (10) days herefrom, move for reconsideration of this portion of the Order provided that such motion is accompanied by an itemized list of all documents filed in the Court record whose printing or copying costs Plaintiffs seek to recover.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of August, 1980.

/s/ Sidney M. Aronovitz

UNITED STATES DISTRICT JUDGE

Copies furnished to:
James M. Brachman, Esq.
Rodger Traynor, Jr., Esq.
Lane, Mitchell & Harris, P.A.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

CASE NO. 80-5787

CORAL GABLES IMPORTED MOTORCARS, INC.
and CHARLES M. REBHAN,
Plaintiffs/Appellees,

vs.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant/Appellant.

PETITION FOR REHEARING

The Petitioners, CORAL GABLES IMPORTED MOTORCARS, INC. and CHARLES M. REBHAN, respectfully petition for rehearing before the original panel in this cause.

Respectfully submitted,
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BY /s/ C. R. Murray Jr.
C. R. MURRAY, JR.,
ESQUIRE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel for Appellees, certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

1. Fiat Motors of North America, Inc., formerly known as Fiat Distributors, Inc., the Defendant;

2. Coral Gables Imported Motorcars, Inc., a Florida corporation, a Plaintiff; and

3. Charles M. Rebhan, the President, Director and Owner of all the issued and outstanding shares of Coral Gables Imported Motorcars, Inc., a Plaintiff.

STATEMENT OF THE ISSUES ON PETITION FOR REHEARING

Petitioners respectfully submit to this panel that this Court erred in its decision of April 23, 1982 in the following particulars:

1. The Court erred in that it misread the pleadings filed by the Petitioners in this cause in that the causes of action asserted by the Petitioners against Fiat Motors of North America, Inc. were outside of the Dealer Sales and Service Agreement between Fiat Motors of North America, Inc. and Coral Gables Imported Motorcars, Inc., and a clear reading of the Dealer Sales and Service Agreement establish that the only parties thereto are Fiat Motors of North America, Inc., formerly

known as Fiat Distributors, Inc., and Coral Gables Imported Motorcars, Inc., the corporate Petitioner.

2. This Court incorrectly applied the choice of law provision contained in the Dealer Sales and Service Agreement, as set forth in Paragraph Tenth of Page A-5 thereof.

3. This Court failed to apply Florida law as was applied by the able trial judge below as to the oral contract of Fiat Motors of North America, Inc. to pay the losses of Coral Gables Imported Motorcars, Inc. in that the oral contract was entered into in Florida, was to be performed in Florida, and was breached in Florida, and thus, Florida law should apply.

4. This Court erred in applying the Release set forth in the Second Dealer Sales and Service Agreement as found at Paragraph Sixth thereof in that the Court failed to consider the synergistic result of all the circumstances concerning the operation of the Coral Gables dealership and the prior relationship between the Petitioners and Fiat Motors of North America, Inc. in construing the Release to release all claims, specifically the oral contract to pay losses, when under the unrebutted testimony of Mr. Rebhan at the trial the repudiation by Fiat Motors of North America, Inc. of its agreement to pay the losses of Coral Gables Imported Motorcars, Inc. did not occur until after the execution of the Second Dealer Sales and Service Agreement, and thus, since the claims of Petitioners did not mature until that date, the Release executed prior to that date cannot be construed to bar an unmatured claim.

5. This Court neglected to determine the status of the individual claims of Rebhan, as the Dealer Sales and Service Agreement, as indicated therein, was only between Fiat Motors of North America, Inc. (formerly Fiat Distributors, Inc.) and Coral Gables Imported Motorcars, Inc., and as Rebhan was not a party thereto, said Release could not have extinguished his claims.

6. This Court overlooked the fact that the Releases contained in Paragraph Sixth of the Dealer Sales and Service Agreement is limited to the subject matter of the Dealer Sales and Service Agreement, and thus, when read in its entirety cannot operate to release the claims of the Petitioners against Fiat Motors of North America, Inc.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This case was tried for a two-week period before a jury in the United States District Court for the Southern District of Florida, the Honorable Sidney A. Aronovitz, Judge. Upon the case being submitted to the jury, under instructions by the Court, a jury verdict was returned in favor of the Petitioners herein awarding the Petitioners the total sum of $425,000.00, as compensatory damages, and $166,828.00, in punitive damages.

By timely notice of appeal, Fiat Motors of North America, Inc. presented this matter for review to this Court. After being fully briefed, oral argument was in this cause on March 2, 1982. Thereafter, this Court, by opinion dated April 23, 1982, reversed and remanded this cause.

It is from the decision of this Court of April 23, 1982 that the Petitioners respectfully request rehearing by the original panel of this cause.

INTRODUCTION

The Petitioners in this cause, Coral Gables Imported Motorcars, Inc. and Charles M. Rebhan, will be referred to as the Petitioners, or Gables, or Rebhan, respectively. The Defendant/Appellant, Fiat Motors of North America, Inc., will be referred to hereout as Fiat.

The first Dealer Sales and Service Agreement between Fiat Motors of North America, Inc. (formerly known as Fiat Distributors, Inc.) and Coral Gables Imported Motorcars, Inc., executed in June of 1975 will be referred to hereout as the "First Agreement." The second Dealer Sales and Service Agreement between Fiat Motors of North America, Inc. and Coral Gables Imported Motorcars, Inc. executed in December of 1975, and the one which contains the release travelled upon by this Court in its opinion of April 23, 1982, will be referred to hereout as the "Second Agreement."

All emphasis noted in the argument portion of this Petition is in the original unless otherwise noted.

This Court has erred in its analysis of the pleadings of the Petitioners in this cause. The Petitioners sued Fiat in four counts, each count based upon the common law of the State of Florida. Count I was a suit for fraud and deceit in inducing Rebhan to enter into the franchise arrangement with Fiat; Count II was a suit for breach of the oral contract for the payment of losses; Count III

was a suit for promissory estoppel; and Count IV was a suit for negligent representations by Fiat in inducing Rebhan to enter into the franchise agreement with Fiat. None of the four counts of the Complaint were based upon the First or Second Agreements between Gables and Fiat.

Therefore, the choice of law provision of the Second Agreement was inapplicable to this lawsuit. The operative language of the Second Agreement which this Court relied upon in its opinion as to choice of law is found at paragraph Tenth, page A-5 and states as follows:

> "*This Agreement* is to be governed by, and construed according to, the laws of the State of New York . . ." (emphasis added).

The Second Agreement, by its own terms, limits the choice of law to "this Agreement" which is defined at paragraph First, page A-2 as consisting of the "Fiat Dealer Sales and Service Agreement," the "Standard Provisions," "Fiat Dealer Operating Requirements Agreement," and the "FDI 'Fiat Warranty Procedure Manual' ". The language chosen by Fiat in its contract is clear and unambiguous and as recognized by the trial court should be applied according to its terms according to well-settled principles of contract law. *Broad v. Rockwell International Corporation*, 642 F.2d 929 (5th Cir. 1981) (applying New York law); *Edmonds v. U.S.*, 642 F.2d 877 (1st Cir. 1981) (applying Massachusetts law); *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service*, 400 F.2d 465 (5th Cir. 1968) (applying Florida law). It is clear that under the very terms of the Second Agreement and controlling law the choice of law provision cannot apply to this case involving a

suit for common law claims and *not* involving the commercial dealings between the parties or a question of construction of the Second Agreement. It is submitted that Florida law must be applied by the Court, and accordingly, under Florida law the release in the Second Agreement did not operate to bar Petitioners' claims.

The release in the Second Agreement is found at paragraph Sixth, page A-4 and states in pertinent part:

> "Except as herein otherwise provided, upon execution of this Agreement and in consideration of the execution thereof by FDI, *Dealer* releases FDI from any and all claims, demands, contracts and liabilities (including statutory liabilities) of any kind or nature whatsoever, arising from or out of or in connection with any such prior agreements." (emphasis added).

Primarily, the release does not apply to Rebhan's claims because it is limited by its express terms to "Dealer." "Dealer" is defined at page A-1 of the Second Agreement to be "Coral Gables Imported Motorcars, Inc., a Florida corporation of 3199 Coral Way, Miami, Dade County, Florida 33135." Rebhan was not a party to the Second Agreement, never signed in an individual capacity, and therefore, it cannot be construed to cover the release of his own claims. *Prescott v. Kreher*, 123 So.2d 721 (Fla. 2d DCA 1960); *Edmonds v. U.S.*, *supra*; *Broad v. Rockwell International Corp.*, *supra*; *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service*, *supra*. Nevertheless, at page 949, this Court states "the release was sufficient to bar all of the appellees' claims." This was clearly error.

Further, under applicable Florida law, the release in the Second Agreement does not bar Gables' claim as to the oral contract, as the Second Agreement must be read and construed in its entirety. *J.C. Penney Co., Inc. v. Koff*, 345 So.2d 732 (Fla. 4th DCA 1977). This Court states at page 948 of its opinion "It cannot seriously be disputed that the representations and promises allegedly made by Fiat Motors are related to the subject matter covered by this comprehensive franchise agreement." When construed in light of the terms of the Second Agreement itself, that statement is inaccurate, *i.e.*, the Second Agreement sets forth at page A-1 thereof the "Basis of Agreement." See Appendix A.

Set forth in the "Fiat Dealer Operating Requirements Agreement" at page B-1 is further exposition on the relationship between Dealer and Fiat which the Agreement covers. See Appendix B.

The clear meaning of the cited portions of the Second Agreement is that the Second Agreement was to cover only the dealings between Gables and Fiat as relates to the *selling, servicing* and *repairing* of *Fiat automobiles.* At no place in the Second Agreement is any provision, reference, mention or suggestion that the Second Agreement includes in its terms the oral agreement by Fiat to pay Gables' losses.

This Court states at footnote 5 of page 948 that the release purportedly operates to release Fiat "from any liability for expenditures incurred by the dealer in the performance of its contractual obligations." To the contrary, the second sentence of the release is limited by the first sentence. The first sentence states:

"This Agreement terminates and supersedes all prior written or oral agreements, if any, between FDI and Dealer . . . relating to the subject matter hereof, . . ." (emphasis added).

The release goes on to provide:

" . . . upon execution of this Agreement and in consideration of the execution thereof by FDI, Dealer releases FDI from any and all claims, demands, contracts, and liabilities . . ., arising from or out of or in connection with any such prior agreements." (emphasis added).

Thus the phrase, "any such prior agreements," must refer back to agreements "relating to the subject matter hereof" in the first sentence or the two phrases are meaningless within their context. See, *Ralph Hochman & Co. v. Fort Stanwix Mfg. Co.*, 284 F.Supp. 995 (D.C.N.Y. 1967); *J.C. Penney Co. v. Koff, supra.*

Since the subject matter of the Second Agreement does not in any way encompass the payment of losses, the release cannot operate to extinguish Petitioners' claims on the oral contract. Had Fiat meant for the release to extinguish such claims it could have included specific language to that effect in the release, as it knew of the existence of the oral agreement. Further, a claim under the oral contract for the payment of losses did not arise until its breach. That breach did not occur until Fiat (by its President, Manning) told Rebhan it would not pay the losses. It was only after this event that Gables' and Rebhan's claims under the oral contract matured—this was after the Second Agreement was signed and therefore the release was inoperative. *Sottile*

v. Gaines Construction Co., 281 So.2d 558 (Fla. 3d DCA 1973).

The release does not operate to bar the fraud claim of Petitioners because such a construction would disregard the events surrounding the execution of the Second Agreement, *i.e.*:

1. That Gables had been open for business since July, 1975, selling Lancias and used cars only;

2. That Gables had opened, hired personnel, ordered parts and equipment and began advertising based entirely upon the representations of Fiat personnel that the license from the State of Florida was assured;

3. That Gables' license was delayed four months by the protests of Autorico and Hebert;

4. That Rebhan kept Gables open for business after the protests were filed relying only on the promises of Fiat's president that Fiat would pay Gables' losses;

5. That Cables did in fact *begin* selling Fiats in the middle of November, 1975, after receiving its license;

6. That the Second Agreement was given to Rebhan to sign in December, 1975, approximately four weeks after Gables had Fiats to sell;

7. That Fiat did not openly repudiate the oral agreement to pay losses until March, 1976.

The synergistic effect of these facts creates the inference adopted by the jury that the oral contract

was a part of the initial fraud perpetrated in order to prevent Fiat from losing its third dealer in Dade County.

The jury could and did reasonably infer that Fiat's president knew that in December, 1975, the Second Agreement would have to be executed, that it contained a release and thus he could, with impunity, continue the initial fraud by making the oral contract which Fiat had no intention of keeping. Of course, the initial fraud resulted in Gables entering into the Dealer Sales and Service Agreement of June 13, 1975 (the First Agreement). The release in the Second Agreement contains the "in connection with" clause refering to "prior agreements" in the second sentence. Giving this language its plain meaning, the "prior agreement" phrase must refer to the First Agreement since that was the only "prior agreement" relating to the selling, servicing and repairing of Fiat automobiles. The rule under Florida law is that the construction and effect of the release depends upon its purpose, the terms in which it is stated and the subject matter to which it applies. *Bruce Construction Corp. v. Federal Realty Corp.*, 104 Fla. 93, 130 So. 209 (1932). In construing a release and determining the intent of the parties the entire instrument and not detached sections of it must be examined. *Commercial Trading Co. v. Zero Food Storage, Inc.*, 199 So.2d 109 (Fla. 3d DCA 1967). In arriving at its conclusion as to the effect of the release in the Second Agreement this Court has failed to view the evidence in the light most favorable to Petitioners and has not given them the benefit of all favorable inferences from the facts proved as required under *Indemnity Insurance Co. v. Pioneer Valley Savings Bank*, 343 F.2d 634 (3d Cir. 1965); *Pollice v. Hartford Fire Insurance Co.*, 355 F.2d 524 (7th Cir. 1965); *Atlantic Refining Co. v. Evans*, 251 F.2d 277 (5th Cir. 1958).

Similarly, the release in the Second Agreement does not operate to bar Petitioners' claim for negligent misrepresentation as set forth in Count IV of the Complaint. Under Florida law, for an express agreement to exempt a defendant from liability for negligence, it must be shown that the terms of that agreement put the plaintiff on notice that those terms applied to a particular negligence. *Precisionware, Inc. v. Madison County Tobacco Warehouse, Inc.*, 411 F.2d 42 (5th Cir. 1969). The same result holds true even under New York law. *Pipe Welding Supply Co. v. Gas Atmospheres, Inc.*, 201 F.Supp. 191 (D.C. Ohio 1961) (applying New York law).

Alternatively, if the Court, in fact, does find that the instant lawsuit was based upon, and therefore falls under, the provisions of the Second Agreement, there was error committed in this Court's analysis of the issue of economic duress as a ground for relief. Under the Uniform Commercial Code (F.S. §672.302) a court may refuse to enforce any clause of a contract which it finds *unconscionable* at the time it was made. This provision is applicable in the instant cause in light of the events leading to the execution of the Second Agreement since Fiat was at all times the *sole* source of supply to Gables of Fiat automobiles, parts and warranty authority. In light of Gables' financial position at the time of the execution of the Second Agreement it was this kind of situation which F.S. §672.302 was to ameliorate. As stated in the official Uniform Commercial Code Comment:

> "This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be

> unconscionable . . . The basic test is whether, in light of the general commercial background and the commercial needs of the . . . particular case, the clauses involved are so one-sided as to be unconscionable under the cicumstances existing at the time of the making of the contract . . . The principle is one of the prevention of oppression and *unfair surprise* . . ." (emphasis added) F.S. §672.302, Uniform Commercial Code Comment, p. 172.

Further, the doctrine of economic duress is one well recognized in law. *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 62 S.Ct. 581, 86 L.Ed. 855 (1942); *Pure Oil Co. v. Tucker*, 164 F.2d 945 (8th Cir. 1947). "The word 'duress' implies feebleness on one side, overpowering strength on the other." *U.S. v. Bethlehem Steel Corp.*, 62 S.Ct. at 587. The essence of duress is that one person has taken unfair advantage over another which cannot be permitted to be rewarded by enforceability. As stated in *Williston on Sales*, 4th Ed., Vol. 1, §§11-12, p. 488 (1973):

> "What the court must keep in mind when it does apply such a test is that circumstances existing at the time it [the contract] was made are *not* to be those that are reasonable to the business community *but must be those which in its estimation best serve fair play and justice.*"

While this Court notes that Gables would not have been able to continue to receive cars if it did not execute the Second Agreement it dismissed this fact as being "alone . . . insufficient to establish duress." pp. 949-950 of opinion. No contention was ever made that this fact "alone" established duress. The other facts were the

weak financial condition of Gables due to the four month delay in having Fiats to sell, the fact that Manning—Fiat's president—promised Rebhan to make good Gables' losses to induce Rebhan to stay in business and that the Second Agreement was presented for signature on a take-it-or-leave-it basis four weeks after Gables began selling Fiats. Case law clearly states that the exercise of a legal right such as Fiat's right to request the agreement for continuation of delivery and any business relationship can, under the circumstances, constitute duress such that relief is appropriate. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). In the Reply to Affirmative Defenses, the Petitioners plainly put this issue in controversy (R. 283). The Second Agreement was "made by filling in names . . . on a printed form furnished by [Fiat]. This form has quite obviously been drawn by skillful craftsmen with . . . [Fiat's] . . . interests in mind." *Campbell Soup Co. v. Wentz*, 172 F.2d at 83.

As an additional ground for disposing of Petitioners' fraud claims, the Court at p. 950 cites the issue of waiver. This Court states that Petitioners "knew or reasonably should have known all the pertinent facts constituting the alleged fraudulent activities at the time the second franchise agreement was executed." (opinion at p. 950). Under Florida law, fraud is not presumed. *Graessle v. Schultz*, 90 So.2d 37 (Fla. 1956). Even absent this presumption, this Court has overlooked the fact that Petitioners had no reason to believe that any fraud had been practiced upon them. Fiat's president had, in fact, acknowledged that Fiat had created a problem but then made the oral agreement to pay Gables' losses to keep Gables open. This promise would

also act, inferentially, to forestall any action by Gables against Fiat arising out of the misrepresentations.

Under Florida law waiver is a question of fact by reason of the subjective aspect of waiver. *Rutig v. Lake Jem Land Co.*, 155 Fla. 420, 20 So.2d 497 (1945); *Davis v. Davis*, 120 So.2d 377 (Fla. 1st DCA 1960). The trial court instructed the jury on this issue at the request of Fiat and the jury resolved this issue adversely to Fiat. Because the jury expressed a reasonable decision based on the facts, the Court has erred in substituting its own view therefor. *Atlantic Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962).

The cases relied upon by this Court in its opinion concerning this point are distinguishable. *Bissett v. Ply-Gem Industries, Inc.*, 533 F.2d 142 (5th Cir. 1976) acknowledges the liberal standard vis-a-vis proof of fraud in cases of this type. The Court states that:

> "Certainly, by 1970 the plaintiffs should have learned that defendants had made some misstatements about the future course of events. However, we cannot conclude, as a matter of law, that plaintiffs should have known by then of the *fraudulent* nature of these misstatements. 533 F.2d at 151.

Benn v. Key West Propane Gas Corp., 72 So.2d 910 (Fla. 1954) in factually inapposite. In *Benn* the buyers of an ice manufacturing business sought rescission and cancellation of their contract of purchase some year and one-half after taking possession and control of the business pursuant to the contract as a result of certain

fradulent representations which were claimed to have induced them to enter into the contract of purchase. The buyers had *actually discovered* the misrepresentations within a very few days after taking possession of the business. The seminal issue was *whether the buyers had waited an excessive period of time to file suit for rescission and cancellation* and under the facts of that case the court concluded that they had. This is far removed from the facts of this case in which the misrepresentations were made in May and June of 1975 and suit was filed in March 1976.

The reliance upon *Harpold v. Stock*, 65 So.2d 477 (Fla. 1953) is misplaced. The question before the court was:

> ". . . after executing the agreement of February 11, 1952, and liquidating the business, is Harpold in position to claim damages for fraud . . . ? (at p. 478).

The Florida Supreme Court, answering the above question in the negative, found it significant that:

> "Harpold contends that he received no benefit from the agreement of February 11, 1952, or the liquidation that flowed from it, that he got no concession from it and that there was no intention to waive fraud. The record, however, shows to the contrary. We do not detail the figures to reveal the *amount of benefits that flowed to* Harpold, but the net result was that he received more than $9,749.98, and that *Stock not only lost his security but was still due $13,079.12 on the transaction.*" (at p. 478; emphasis added).

"Harpold conducted the business from June, 1951 to February 11, 1952, when he executed the new agreement, under which *he and his company received large sums of money and concessions* resulting from the liquidation. *None of* this *money and concessions would have passed to him except for the new agreement.* It was a compromise of existing differences between Harpold and Stock and the former executed a full release to the latter. *There can be no basis for an action on fraud under such circumstances.*" (at p. 478; emphasis added).

The case before this Court is quite different from *Harpold v. Stock, supra.* In the instant case, the second Dealer Sales and Service Agreement of January 14, 1976 was *not* executed to compromise existing differences between plaintiffs and defendant, not did plaintiffs receive "large sums of money and concessions" for executing the Second Agreement, and certainly plaintiffs did *not* receive anything which would *not* have passed to them "except for the new agreement."

As this Court noted in *Excel Handbag Co., Inc. v. Edison Brothers Stores, Inc.*, 630 F.2d 379, fn. 19 p. 387 (5th Cir. 1980), when a party claiming to have been defrauded continues to transact business with respect to the contract fraudulently induced, that party has waived his right to object to the illegality of the contract, *although an action for damages caused by the fraud can be maintained.* As stated above, the fraud on Rebhan and Gables did not end with the original misrepresentations. The oral contract to pay the losses was a part of the fraud because Fiat had to ensure that Gables remained open for business in order to have a

dealer to present to the Division of Motor Vehicles for licensing purposes. These facts and the reasonable inferences therefrom mitigate against waiver.

CONCLUSION

It is respectfully submitted that based upon the foregoing law and argument this Court has erred in the decision of April 23, 1982.

1. The release contained in the Second Agreement does not operate as a bar to Rebhan's individual claims as he was not a party to it.

2. The release does not bar the claims in the oral contract because that claim had not matured at the time the Second Agreement was executed.

3. The release does not bar the negligence claim because the language of the release does not so provide with unquestionable clarity.

4. The release does not bar the fraud claim because it cannot be said as a matter of law that Petitioners knew of the fraudulent nature of the misstatements at the time the Second Agreement was signed.

This Court has erroneously substituted its view of the facts for that of the jury, and therefore exceeded the permissible scope of their review.

This Court can and should recede from its opinion of April 23, 1982, and affirm the judgment below.

Respectfully submitted,

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BY /s/ C. R. Murray Jr
C. R. MURRAY, JR., ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was furnished by mail on this 12th day of May, 1982 to:

GREENBAUM WOLFF & ERNST
2860 One Biscayne Tower
Two South Biscayne Boulevard
Miami, Florida 33131

JACK M. BATTAGLIA, ESQUIRE
437 Madison Avenue
New York, New York 10022

BY /s/ C. R. Murray Jr
C. R. MURRAY, JR., ESQUIRE

FIAT DISTRIBUTORS, INC.
FIAT DEALER
OPERATING REQUIREMENTS AGREEMENT

Fiat Distributors, Inc., in its sincere desire to promote and improve the merchandising and servicing of Fiat passenger cars in the United States, through the cooperation of independently owned and operated Fiat dealerships, recognizes the need for sound business practices—ethical while competitive—if the long-range goals of Fiat Distributors, Inc. and its dealers are to be achieved. In this recognition, Fiat distributors, Inc. has established standards for dealership operations, in the knowledge that adherence to such standards will enhance the public image of Fiat vehicles and of the dealers who sell and service them and will help insure the mutual success of Fiat distributors, Inc. and its dealers

Dealer recognizes that public confidence is the priceless ingredient in any successful sales and service program, and agrees that such confidence is earned only by conducting its business in such a manner as to assure its customers of fair play, dependability and efficiency of service.

For these reasons, the undersigned Dealer agrees to operate and conduct its Fiat business in accordance with Fiat distributors, Inc. Fiat Dealer Sales and Service Agreement, the Fiat Distributors, Inc., Fiat Dealer Sales and Service Agreement Standard Provisions and such reasonable standards as may be established by Fiat distributors, Inc. for the Dealer from time to time for net working capital, wholesale finance commitment, personnel, sales objectives, used cars; service and parts departments, inventories and other elements of the

Dealer's operations. The standards in effect on the date hereof are set forth below.

I. GENERAL

It is agreed that Dealer will, through all its departments, safeguard and promote the reputation of Fiat products and avoid discourteous, deceptive, misleading or unethical practices, and will do everything in its power to establish good customer relations. In addition, Dealer will provide the following:

A. Net Working Capital will be maintained at not less than $110,000—

B. A wholesale finance commitment on a continuing basis by a financing institution approved by FDI will be provided and maintained exclusively for Fiat in a minimum amount of $200,000—

C. The following persons will participate actively in the daily operation and management of Dealer's Fiat business.

New Car Sales Manager Fred Couch

Used Car Sales Manager Tony Petruzelli

Service Manager Gene Richmond

Parts Manager Clearance Jones

FIAT DISTRIBUTORS, INC.

DEALER SALES AND SERVICE AGREEMENT

AGREEMENT, effective as of the 14th day of February, 1976 by and between Fiat Distributors, Inc., a New York corporation, with headquarters at 155 Chestnut Ridge Road, Montvale, New Jersey, hereinafter referred to as "FDI", and

CORAL GABLES IMPORTED MOTORCARS, INC.
Name of Dealer

a FLORIDA:
State

corporation ☑ co partnership ☐

individual ☐ limited partnershp ☐

doing business as _____
Name

of 3199 CORAL WAY MIAMI
Number and Street City

County DADE State FLORIDA Zip 33135

hereinafter referred to as "DEALER".

BASIS OF AGREEMENT

FDI has the right in the United States (including Hawaii and Alaska) to distribute, use, sell and service Fiat motor vehicles and components, parts and accessories

therefor. These motor vehicles and parts and accessories therefor are sold to the public and serviced primarily by authorized dealers. FDI and Dealer recognize that Fiat motor vehicles over a period of years have earned the good will of the motoring public. FDI and Dealer further recognize that the success of the distribution and sale of such motor vehicles is dependent upon the continuation of this good will and that, in order to maintain and further this goodwill, FDI must distribute only quality Fiat motor vehicles to quality dealers, and Dealer must sell and service such vehicles under fair policies and courteous practices.

Defts Ex #19 for [copy illegible]
7/7/76 — —

In order that the public, FDI and each of its dealers obtain the maximum benefit from the method established by FDI for the sale of Fiat motor vehicles, it is necessary that dealers be selected who enjoy good reputations in their respective market areas and possess facilities and personnel in keeping with the sales potential in such areas. It is expected that each Fiat dealer will adopt and follow sound business practices in order to fully develop the market for Fiat motor vehicles in his sales area.

FDI will provide extensive sales and merchandising programs designed to assist dealers in merchandising and servicing of motor vehicles, parts, accesories and equipment. Experienced sales, service and parts specialists of FDI are available to assist Dealer and to provide counsel and advice toward the conduct of his dealership on a successful basis.

This Agreement is intended to set forth in a clear and understandable manner the terms and conditions under which Dealer and FDI agree to do business together and to set forth the responsibilities of each to the other and to the public. By fully assuming such responsibilities and through cooperative effort, each will benefit from public goodwill and the resultant business success.

IN CONSIDERATION of the foregoing and the mutual agreements herein contained, the parties hereto agree as follows:

FIRST: As used in this Agreement, the following terms shall have the following meanings:

(1) **This Agreement** shall include this Fiat Dealer Sales and Service Agreement and the accompanying Standard Provisions, Fiat Dealer Operating Requirements Agreement, and the FDI "Fiat Warranty Procedure Manual".

(2) **Fiat S.p.A.** is the manufacturer of Fiat Vehicles; it is a limited company organized and existing under and by virtue of the laws of the Republic of Italy.

(3) **Fiat passenger car or vehicle** shall mean any new passenger car bearing the trademark or trade name Fiat and which has been certified by Fiat S.p.A. to conform with all applicable Federal motor vehicle safety and emission control standards.

(4) **Fiat parts and accessories** shall mean new parts, components and accessories manufactured for or by FDI, designed primarily for use on Fiat passenger cars and distributed by any subsidiary or Parts Depot of FDI.

(5) **FDI Products or Fiat Products** shall mean new Fiat passenger cars, parts and accessories therefor, and tools and equipment therefor, and other products whether or not manufactured or supplied by Fiat S.p.A. which from time to time may be offered by FDI to Dealer for resale under this Agreement.

APPENDIX E

Rebhan—direct

Challenger Club. That's a group of dealers—it's a sales award where you have to sell a thousand new cars a year. We were one of the charter members of that club.

When I sold the business, I believe there were only ten of us left out of 1500 Dodge dealers in America. There were ten charter members of the Challengers.

We were a member of the Challengers every year we were there.

We won the Century Award, which is for selling again a hundred new cars a month. That's an award that we won for about two years. We won that every month for two years.

We won the Distinguished Dealer Award about twelve years in a row, which is really the nicest award of all we had, because that included sales, service, parts and dealership management.

I believe we were the only dealer in Dade County that ever won that award more than once and we won it twelve years in a row.

Then I was on a couple of national dealer advisory conferences, and things of that nature.

Q. Approximately what was the largest number

* * * * *

was a few blocks east of us and they were the top two volume products in the imports.

Then there was a Volkswagen dealer south of us.

Since Fiat was No. 4 and there weren't any Fiat dealers in the area, that became our number one possibility.

Q. When you say Fiat was No. 4, what do you mean?

A. I believe they were the fourth largest importer of registrations in the United States. They were fourth in registrations in the United States at that time or fourth in sales—either registrations or sales.

Q. After arriving at the conclusion that you would be interested in the Fiat line, did you take any steps to consumate and obtain this line?

A. Yes, we did. Fred Couch had called Fiat and they sent Mr. Bartlett down to talk to us. About the middle of May, Mr. Bartlett came down and met with Fred Couch and myself.

THE COURT: Of what year?

THE WITNESS: I'm sorry. April of 1975. I meant April. I'm sorry.

About the middle of April of 1975, Bill Bartlett came down and Fred—with Fred Couch and myself in my office at Trail Dodge, we discussed with him what our plans were. He told us at that time that there was a point available, that Orange Motors was no longer in business, at the Coral Gables location, Orange Motors Coral Gables.

So Mr. Couch had then took Mr. Bartlett over and showed him the location that we were interested in. By that time it was still a Chrysler-Plymouth dealership.

He came back and we gave him a background on some of the things we have done at Trail and the things we do there, how we sell cars. We gave him a background on myself and a background on Fred Couch.

At that time he seemed very happy. He said he would be back in a couple of weeks to take an application from us.

Q. What was Mr. Bartlett's title, if any, with Fiat?

A. I believe it's called District Sales Manager.

Q. Was he the one responsible to sign up new Fiat dealers?

* * * * *

A. Okay.

Q. Now, at this second meeting, was there any discussion relative to the name to be used, if you were to become a Fiat dealer?

A. Yes. We discussed that. The only thing Mr. Philbrook wanted us to do was use the name Coral Gables, and this was for whatever name we could come up with because we were replacing Orange Motors of Coral Gables and even though we were actually, I would say, two or three blocks or maybe five blocks out of Coral Gables, he requested that we use the name Coral Gables because that was the dealer who we were replacing.

Q. Mr. Rebhan, again at this second meeting did you discuss anything relative to the amount of capital or infusion of monies that would be necessary if you were to become a dealer?

A. No. We actually went over that at the next day, but not at that particular time with Mr. Philbrook there.

Q. You had another meeting with Mr. Philbrook the following day?

A. No. The following day I believe there was just Mr. Bartlett. I don't believe Mr. Philbrook was there the next day.

* * * * *

answered, which is fine, but then he goes on and starts to give us reasons which are self-serving.

THE COURT: Well, I'm going to allow him to testify. You will get a full opportunity on your cross examination.

MR. WARD: Thank you, Your Honor. I'll wait, of course.

BY MR. HARRIS:

Q. At this meeting on the second day with Mr. Philbrook and Mr. Bartlett, were you told that you would be able to be a replacement dealer?

A. Yes.

Q. Who told you that?

A. We were told both by Mr. Philbrook and Mr. Bartlett at different times.

Q. Were you told anything about the protest?

A. No, we weren't told anything about the protest, no protest or anything like that.

Q. And this is the second meeting; was there anything disclosed at the second meeting about a history of protest or threatened protest involving Fiat?

A. None whatsoever.

THE COURT: Counsel, you are leading the witness.

* * * * *

A. No, we did not discuss protest.

Q. Mr. Rebhan, going from the time you completed the application, did you ultimately sign a franchise or dealer agreement?

A. About two weeks later in the middle of May we again had a meeting with Mr. Bartlett, and at this meeting—this was at Trail Dodge in my office with Fred Couch, and he came with the dealer sales and service agreement and we actually filled it out at that time.

Q. When did you get that agreement?

A. I believe it was at that meeting that we completed it, about mid May of 1975.

THE COURT: Well, did you sign it then?

THE WITNESS: Yes.

BY MR. HARRIS:

Q. You executed the dealer's sales and service agreement?

A. Yes, sir.

Q. At or about this time, Mr. Rebhan, were there ever again any discussions relative to whether or not you were a replacement dealer?

A. No, not at that time. We just filled out the application and signed it. That was that.

* * * * *

to Fiat?

A. At the time we signed that agreement, I believe we gave them a check for parts which was approximately $45,000.

It may have been a little more. If I'm not mistaken, I think we also had to purchase some tools and things of that nature. It came about to right around $50,000, I believe.

Q. And at the time you executed this, you were accepted by Fiat?

A. I believe that was the time. I'm not absolutely positive. I thought when I executed the service and sales agreement, or when I signed that agreement, I believe, that I had a check.

Q. Mr. Rebhan, did you, following the execution of the franchise agreement, take any steps relative to an application to become a dealer with the State of Florida?

A. Yes.

Q. Would you tell us what steps you took at that point in time?

A. At along about the end of June, I believe it was, 1975, we contacted the Department of Motor Vehicles, Mr. O'Connor, who came out to the dealership

* * * * *

BY MR. HARRIS:

Q. Now, you referred earlier to the fact that Mr. Philbrook had cleared this through Mr. Calvin.

Did Mr. Philbrook tell you that?

A. Yes, he did.

Q. When did he tell you that?

A. I can't remember the exact date, but it was like—it was probably in the middle of May.

At that time we were filling out the dealer sales and service agreement, right about that time, and we had conversations with him.

He told us that he had already cleared it through this John Calvin's office and that we had no problem.

Q. Did he say that you would be a replacement dealer?

A. Yes, many times he told us that we were a replacement dealer.

Q. Mr. Rebhan, again, trying to keep this in the sequence of events, what steps, if any, did you take in your preparation for the opening of the Fiat dealer franchise?

A. Well, once I got the Fiat sales and service agreement back and signed by Mr. Manning and Mr. Nelson as president and vice president of Fiat, I then went and signed a lease with Chrysler Realty and I secured the lease on the property for ten years, and then we hired—went about hiring and training employees.

We actually hired and trained twelve salesmen the last week in June and the first couple of days in July, for we planned to open up on July 7th.

Q. Now, if I can ask you this, did you organize a corporation?

A. Yes.

Q. And what was the name of that corporation?

A. We called it "Coral Gables IMported Motorcars."

Q. "Inc."?

A. "Inc."

Q. And who, sir, owned the stock of that corporation?

A. I was the sole stockholder.

Q. Were you an officer and director of the corporation?

A. I was an officer and director also.

Q. Now, at the time that you organized it—

A. And president.

Q. At the time that you organized that corporation, was it necessary to invest any monies into it?

A. Yes, sir, at that time, or during that month of May and June—during those two months we put in approximately $30,000 in cash.

I put in about $30,000 in cash and I secured a loan, financing through the Royal Trust Bank for another hundred thousand dollars in cash, and then I also made arrangements for financing the new cars when they came in.

Q. Mr. Rebhan, would you explain why you arranged financing?

A. Well, why I arranged financing for the new cars?

Q. Yes.

A. When a manufacturer sells a dealer a car, they expect, or they expect to get paid immediately, and since dealers in most cases don't have cash to pay for all of that cost, they have to finance their inventories.

We call that a "floor plan."

So I went to the bank and made arrangements for a floor plan of about $250,000 worth of new Fiats.

Q. Did you make any arrangements on or about that time for the financing of used cars?

A. No.

Q. Why wouldn't you?

A. Well, it's—as a general practice, they won't finance or give you money—they won't give you a capital loan to finance new and used cars, both.

All three of those banks generally will do it—they might give you a capital loan and finance new cars, but they won't finance used cars, or they

* * * * *

and ask you if you can identify that.

A. Yes. This is the lease agreement between Chrysler Realty and myself.

MR. HARRIS: At this time I offer it in evidence.

MR. WARD: No objection. I just want to look at it.

THE COURT: Without objection, admitted as Plaintiffs' Exhibit No. 28.

(The document referred to was received in Evidence and marked Plaintiffs' Exhibit No. 28.)

BY MR. HARRIS:

Q. Under this lease, what monthly rental did you actually pay?

A. I believe the combined total of the rent and taxes was about 80, rounded off, 8500 a month.

Q. Now, Mr. Rebhan, what other steps, if any, did you take in preparation for the opening of your place?

A. We hired a sales staff and we hired mechanics. We trained our sales staff. We hired some clerical help; took all the steps that were necessary so that we could open up and start business.

Q. Now, before you could hire the staff, you had to recruit salesmen, gentlemen?

A. Right. We picked 12 new car salesmen and we ran an ad in the paper and we had about two—well, over two hundred people that came in and applied for the jobs, and out of that group we picked 12.

Then we trained them, and in a sense had a training program for one week. Mr. Couch did the training. We were a member, at the time, of Trail Dodge Automotive Profit Builders and Sales Program, and there were a couple of hundred dealers in America on this sales program.

What it is is that it is a method or way of selling new cars; how to train people to do business, how to sell cars, and we had them on that. It had been quite successful with us, so we trained our new personnel.

MR. WARD: Your Honor, I think he has answered the question.

THE COURT: I think it was answered, too.

Counsel, you may ask the next question, please.

BY MR. HARRIS:

Q. Mr. Rebhan, was it necessary to prepare the physical premises for your opening?

A. Yes; we painted and we hung wallpaper. We did several things, clean-up work, did that all ourselves.

Q. About when did you do all this?

A. We did that in the first part of July, 1975, around July 5th, 6th.

* * * * *

THE COURT: Let him answer it fully. You can cross examine him on it. Go ahead.

THE WITNESS: Yes, we were promised Fiat cars and we even had the invoices on the cars showing which cars we were getting, how they were equipped, things of that nature.

BY MR. HARRIS:

Q. Now, you say that you were promised cars. Can you tell me who promised you that you would have these cars?

A. All of this came from Jacksonville's Fiat's offices in Jacksonville, to Coral Gables Imported Motorcars.

Q. Now, when were you told that your cars would arrive?

A. We were told that they had already left and that they would be there on a Monday, July 7, 1975. We were there in anticipation, waiting for the cars. We knew which cars were coming.

MR. WARD: Your Honor, if he would simply answer the question and would not expound—

THE COURT: Now, don't volunteer information. Your lawyer is a good lawyer. He will represent you, if you leave out something, and he will ask you the

* * * * *

MR. WARD: Objection, Your Honor.

THE COURT: Sustained. He can tell us what he did as a result of the letter.

BY MR. HARRIS:

Q. What did you do when you received the letter?

A. Well, immediately Fred Couch and myself, between the two of us, I guess, we started to call everybody we knew at Fiat and tried to find out what was going on. We were really in—

THE COURT: That's enough.

THE WITNESS: —really in shock.

BY MR. HARRIS:

Q. Whom did you call at Fiat?

A. We talked to Mr. Philbrook, I, myself; we talked to Bartlett and I'm sure Fred Couch talked to Bartlett.

I talked to Mr. Manning, president of Fiat.

Q. Can you tell me what was discussed with Mr. Manning?

A. Yes, it was a couple of days after we got that letter and we were getting nowhere with Mr. Philbrook or anyone, so we called—

* * * * *

meaning Fred Couch and myself, called him again, and at that time he told us that—again, I related the situation and said, "What are you going to do? I got all of these people here. Everybody was yelling at us at that time because we had no cars to sell."

MR. WARD: Your Honor, I'm going to object. He said that everybody is yelling.

THE COURT: I'm going to allow him to continue to express the conditions as they existed at the time. Overruled. You can cross-examine him on whom he means by everybody.

MR. WARD: I want my objection on the record even though you've ruled against me. I object to the answer as being conclusory and involving hearsay, also being unresponsive to the question.

THE COURT: Overruled.

THE WITNESS: So Mr. Manning at that point—Mr. Manning said for me not to worry, not to get too excited, that he would take care of any losses the company might have until, up until the time we got to Fiat—actually into the dealership, and he also told me that he thought

that there was some pressure he could apply on the existing Fiat dealer, that that problem may be able to be resolved quite rapidly. That was about the substance of that conversation, which satisfied me at that time.

BY MR. HARRIS:

A. Did he indicate when he thought you might receive your cars?

A. No, he just said that he had hoped that they could clear it up immediately.

Q. Mr. Rebhan—

MR. WARD: A point of information. May I approach the Bench?

THE COURT: Yes, sir.

(Side bar conference between the Court and counsel)

MR. WARD: Your Honor, you indicated earlier today that we could make an objection when they start to put in the evidence of both alleged fraud and alleged breach of an oral contract, that is, in order to preserve the record, and I think we have reached that point. You may note my objection to any testimony now about an alleged oral agreement on the grounds that they have elected, when they put in the evidence of alleged fraud and alleged damages—so that I may have a continuing objection to any further testimony in respect of the alleged breach of an oral contract.

MR. HARRIS: Is that what you discussed with Mr. Mitchell earlier today?

THE COURT: It is one that he brought up in open court.

MR. HARRIS: I'm sorry, I was not here then.

(Side bar conference concluded)

THE COURT: Ladies and gentlemen of the jury, there is still a considerable way to go yet with this witness. Let's take a recess at this point, ten-minute recess. Please remember the cautionary instruction.

(Recess taken)

THE COURT: We were at a bench conference at the time that the Court recessed. Mr. Ward had noted a continuing objection on the basis of the motion that Mr. Traynor had argued earlier about electing with regard to oral contracting and/or the franchise agreement.

Mr. Harris, do you want to respond in the record?

MR. HARRIS: Your Honor, I talked with Mr. Mitchell.

I think you were in earlier in this conference, were you not?

MR. MITCHELL: Our argument would remain the same as it was before, Your Honor.

THE COURT: With the arguments noted and there being a continuing objection, the objection is overruled and it will be noted as a continuing objection.

MR. WARD: We would further object to any evidence about the alleged oral agreement on the grounds of the statute of frauds and parole evidence.

THE COURT: Within the scope of the rulings already made and limiting the admissibility of such evidence to rulings that I have already made, I will overrule the objection.

MR. BRACHMAN: Your Honor, the specific parole evidence rule violation which we claim is an inconsistency between the oral contract and the second franchise agreement, the argument being it varies the terms of certain provisions of the second franchise agreement.

THE COURT: Let the record so reflect.

MR. WARD: Thank you, Judge.

MR. MURRAY: Mr. Traynor, during the break, pointed out to me that it appears that the lease that was in there has some pages that would not be in ours. What I would like to do is have Mr. Rebhan take a look at it and see if he can identify it as being the lease. If it is, we can substitute it for this document.

THE COURT: Is there any objection?

MR. WARD: I think we ought to have a complete document.

THE COURT: Have him identify it and offer it in substitution for Plaintiffs' Exhibit 28.

MR. MURRAY: Mr. Rebhan has so identified it, Your Honor.

THE COURT: Without objection, this will be substituted as a new Plaintiffs' Exhibit 28 in lieu of the former exhibit, the same being the lease agreement of the Coral Way and 32nd Avenue premises.

MR. WARD: With the Court's permission, in order that the record will be complete, Mr. Traynor would like to recite in the record the citation of authorities that he relied upon this morning.

THE COURT: Go ahead.

MR. WARD: We can put it in later.

MR. TRAYNOR: The name of the case is Peoples versus Florida Insurance Guaranty Corporation, 364 So.2d, I believe Page 79. I will find my copy here in a moment.

THE COURT: All right. Bring the jury in, please.

(Jury recalled.)

THE COURT: You may continue the direct examination of Mr. Rebhan.

MR. HARRIS: Thank you, Your Honor.

BY MR. HARRIS:

Q. Mr. Rebhan, you have testified or you just finished testifying about some conversations with Mr. Manning. Did you have occasion to talk with Mr. Manning again after that last one we referred to?

A. Yes. I talked to Mr. Manning three or four times after that, finding out exactly what was going on, what was happening on the problem that they created, what was actually going on, what were they doing to try to alleviate this problem, and also to get assurance again that they were going to cover all my losses.

Q. What did you ask Mr. Manning in these conversations?

A. I asked him what they were doing, what was Fiat doing to try to solve the problem that they had created.

Q. What did Mr. Manning say to you?

A. He said that they were going to try to apply some pressure on Mr. Aguilar to get him to sign a letter of no protest. He told me Mr. Aguilar was a

distributor of Fiats in Puerto Rico and, therefore, they might be able to apply some pressure on him.

Q. In your conversations with Mr. Manning, did he ever indicate any responsibility for the problem?

A. Oh, yes. He never denied responsibility. He said it was a problem –

THE COURT: Tell us what he said, please. Don't generalize.

THE WITNESS: Okay.

THE COURT: I am going to strike that part of your answer.

You can tell us what was said. Don't you draw a conclusion from it. That is what the jury is supposed to do.

THE WITNESS: All right. I'm sorry.

He had told me from the beginning, you know, when we talked about Fiat covering our losses, that it was a problem that they had created and he agreed with me and, therefore, that's why he was going to cover my losses during the period of time I was open but did not have Fiats.

BY MR. HARRIS:

Q. Mr. Rebhan, following your conversations with Mr. Manning, did you take any steps relative to your operations at that time?

A. Yes. In conversations we discussed about buying used cars and we had to do something because we had all these people there. So we immediately went out and purchased a bunch of used cars, used imports, and we made some arrangements at the bank to use some of our credit line, which was going to be for new cars. We switched that over for used cars.

We immediately went out and bought—I

* * * * *

BY MR. HARRIS:

Q. You testified earlier that you applied with the State of Florida to become a new dealer. Now, did it become necessary for you to revise that application after receiving the letter of protest?

MR. WARD: Objection, Your Honor, as to form. The application was that replacement dealer, not a new dealer.

MR. HARRIS: Your Honor, they filed an application to become a dealer.

THE COURT: Take the word "new" or "replacement" out and put the dealer in. In that way he will withdraw his objection.

BY MR. HARRIS:

Q. Did it become necessary to revise your application to become a dealer, a new car dealer?

A. Yes, it did.

Q. Why was that, Mr. Rebhan?

A. We had to re-apply as a Lancia dealer because they couldn't approve the application being in Fiat and Lancia because of the letters of protest.

Q. And approximately when did you re-file a new application?

A. That was about the middle—

* * * * *

the phone. Mr. Nelson was a vice-president of Fiat and he was Mr. Manning's vice-president.

I believe late in July or early in August, Mr. Manning went on vacation or something and at that time my discussions had picked up with Mr. Nelson. We talked about a problem in Miami often, what they were going to do, and things of that nature.

Q. What did you tell Mr. Nelson?

A. I just reiterated to Mr. Nelson, of course, what Mr. Manning had told me, and then Mr. Nelson on different occasions had ideas of what we should try to do to get out of the problem.

At one time he suggested or offered that they give me $25,000 to go buy out the Hebert Fiat franchise in Homestead. Then he kept me informed with what Fiat was trying to do to get Mr. Aguilar to sign the letter of no protest.

Q. Did he indicate anything else that he would do for you?

A. He said that he would take care—he would give me some money because at that time—Now I'm going into about August of '75. We were running out of money fast. He was going to get some money down to me right away so we could keep the business afloat.

Q. Did you ask him for help?

A. Oh, yes. I asked him—I told him if I didn't get help, I would have went out of business. We were running out of money.

Q. What help did he give you, if any?

A. Well, he said they were going to send me a check for $30,000. What they did, they sent a check down for $16,800 in August. I called him quite upset. Number one, it wasn't the amount of money that we discussed. We discussed $30,000. The check was for $16,000.

Also, on the check he put down it was payment satisfying our agreement, and I told him that that wasn't true, it wasn't payment in satisfying our agreement.

Then, after that, about a couple of weeks, maybe a week or so after that, they sent me another check for $13,200, which equalled $30,000, the two checks.

Q. Mr. Rebhan, if I can stop you for a moment.

In your prior conversations, prior to him sending the $30,000 down, did you discuss any other items besides just the $30,000?

* * * * *

that. We also had a problem in service. We couldn't service any cars.

When we got a Fiat in, we had to buy the parts from an existing Fiat dealer, which caused a little bit of a problem. It was a great inconvenience to the customers and a big inconvenience to the employees, to the mechanic working on the car.

He would have to wait half a day to get his parts to fix it. Therefore, our service, you know, it didn't hardly exist. We didn't have much service because the mechanics worked almost entirely on a commission basis—not almost. They work entirely on a commission basis.

Again, you had some guys who were staying there, but they weren't making any money. They went elsewhere where it was easier to make money.

Q. Did you have any conversations with Mr. Nelson relative to your working capital at this time?

A. Outside of the fact that it all disappeared, no.

Q. Now, did Mr. Nelson or Mr. Manning or any of the Fiat representatives have occasion during this time, prior to Mr. Calvin issuing his order, to send any representatives to your facility?

A. Yes. After—

Q. Can you tell us when and who?

A. After one of these conversations with Mr. Nelson in August, Mr. Zivic came down.

Q. Who is Mr. Zivic?

A. I believe he was like the business manager for Fiat in Jacksonville. He came down with Mr. Philbrook

and they went over our financial statements, and he did some checking on the records in the office.

Q. Were any recommendations made by either of these gentlemen as a result of that visit?

A. Well, Mr. Zivic said that he thought we could sell 40 used cars a month and we would have to sell 40 used cars a month to make it there during this interim period.

He figured that our projections of grossing six hundred fifty to seven hundred dollars per car was well in line and he thought everything was all right.

Q. Was that projection of $650 to $700 for used cars?

A. Yes, it was.

Q. What was the effect at this time of basically having used cars to sell, as opposed to having new cars?

A. Well, we were in a bind. We had a problem because we had to immediately go out and buy used cars that were already ready for sale. In other words, we had to go to other dealers and buy a car that they had already reconditioned and gotten ready to sell to the public.

Therefore, we had to buy them right away because we had nothing to sell, so we had to get some merchandise on the lot. Therefore, we paid three to four hundred dollars actually more than the car was worth, so we could get it and get it over to our lot and have something ready for sale right away.

Q. Mr. Rebhan, just for the sake of edification of this jury, as a new car dealer, when you take a trade-in of a used car, what do you do with it?

A. As a new car dealer, you put a value on the trade-in coming in and then you deduct whatever work you may think that car would need to be done. For instance, if a car is worth a thousand dollars, and it needs three hundred dollars' worth of work, you allow that customer $700 wholesale, you know.

We are talking wholesale prices for that car.

Q. Would you take care of having the reconditioning done on that used car yourself?

A. Yes. We do the reconditioning work and get it ready.

Q. Would that reconditioning work be done cheaper than if you went out and wholesale reconditioned the car?

A. Obviously it would, yes.

Q. During this period of time were you selling used cars?

A. Yes, we were.

Q. And approximately how many, do you know?

A. I would say about 30 a month, 25 or 30 used cars a month.

Q. Now, what effect, if any, did the selling of used cars and not having any new cars sold, have on your financing?

A. Well, we end up having to finance some of our used cars and, therefore, we turned the used cars over fairly fast. Then, when we got the new cars in, we had to eliminate, get rid of the used cars that were floor-planned, because we couldn't floor-plan new and used cars.

At that time we had to go out and wholesale our used cars, so we could clear up the floor-plan line, to accept the new Fiats that were coming.

In most cases, we sold the cars out at no profit at all, many times a loss.

Q. Mr. Rebhan, you testified previously, I believe, some time early in September you recieved the sum of $16,800 from Fiat?

MR. WARD: Objection, your Honor. He testified it was in August.

THE COURT: I will let the jury's recollection govern on that.

When was it?

THE WITNESS: I said it was in August and—I thought it was August. I am not sure, your Honor.

MR. WARD: If your Honor please, we are getting into the same mess because we aren't getting the documents, the black and white instruments on which this case is based.

I submit that I probably ought to and I think I will object on the best evidence rule.

* * * * *

alleviate some of my financial problems which were not included in your letter of September 5, 1975.

"Perhaps by now you have been informed by what transpired at the hearing in Tallahassee on Thursday, September 11, 1975. I am hopeful that we will prevail and that within the next two or three weeks we should have a favorable decision from the Department of Motor Vehicles Commission. Nevertheless, from talking with counsel, I understand that it is possible for an unfavorable decision to be

rendered and also if a favorable decision were rendered, it is possible that the protesting parties could file an appeal, post a supersedeas bond, and prevent the granting of a license until such time as the appeal is decided. Accordingly, the problem could continue into the future, and of course my financial problems would so continue.

"From the foregoing, accordingly, I must respectfully take exception to your letter of September 5, 1975, and accordingly the check in the sum of $16,800 is not accepted as indicated in such letter. Please be advised that I have this date deposited said check without prejudice and under protest and reserving all rights and claims which my company might have.

"I suspect that some of the problems pertaining to your letter of September 5, 1975, arose out of some confusion pertaining to communications between your representatives and me. I am sure that you and I can resolve these problems and accordingly I would appreciate your telephoning me to accomplish that purpose.

"I enjoyed meeting with the various members of your organization who participated in the hearing in Tallahassee. I look forward to working with them in the future.

"Best regards.

"Yours truly, Charles Rebhan, President, Coral Gables Imported Motorcars, Inc."

Q. Mr. Rebhan, in this letter when you referred to "some other arrangements," what did you mean by that?

A. I was talking about arrangements that I had with Mr. Manning to cover losses and also the advertising and the parts help that they were going to give me on the parts, spreading out over 12 months rather than doing it all at one time.

Q. Did you ever receive a reply to this letter from Mr. Nelson?

A. No, sir.

Q. Mr. Rebhan, if I may, was the understanding and agreement that you indicated you had with Mr. Manning ever put in writing?

A. No, it was not.

Q. Do you know why it was not?

A. He told me that he couldn't do that because if he did it for me, then the other dealers might see it and he might have to do it for all the dealers that had a problem.

They just couldn't afford to put that in writing at that time; they were also going through some problems with the Anti-Trust suits in Washington, D.C., and he just said that it was absolutely just impossible, that they couldn't put that in writing.

Q. Mr. Rebhan, did you finally receive the other part of the $30,000 payment?

A. Yes, I did.

Q. Do you recall when that was?

A. I'm not sure of the date. It was a couple of weeks after the first check.

I guess that would have been the middle of September, 1975.

MR. WARD: I have no objection to that.

MR. HARRIS: I'm going to offer Plaintiffs' Exhibit No. 23 in Evidence.

BY MR. HARRIS:

Q. I will ask Mr. Rebhan if he can identify it.

A. This is a check for $13,200 from Mr. Nelson to me.

Q. And it was accompanied by a letter?

A. Yes, accompanied by a letter to me from Mr. Nelson.

Q. And what is the date?

A. October 8th, 1975.

MR. HARRIS: I will offer Plaintiffs' Exhibit 23.

THE COURT: Admitted as Plaintiffs' Exhibit No. 23 without objection.

(Plaintiff's Exhibit No. 23 was received in Evidence.)

BY MR. HARRIS:

Q. Mr. Rebhan, on this particular check, did you make a protest?

A. Yes, I did.

Q. And did you put in this language on the reverse side of the check?

A. Yes, sir.

MR. HARRIS: I would again like to publish this, Your Honor.

THE COURT: You may.

MR. HARRIS: This is on the reverse side of the check, Plaintiffs' Exhibit 23:

"Coral Gables Imported Motor Cars hereby reserves all rights and claims it may have against

Fiat Distributors, Inc., and negotiates this check without prejudice and under protest.

"(Continued below)."

And then there is a line for Mr. Rebhan, where he affixes a signature as president of Coral Gables Imported Motor Cars.

Down below it states:

"(Continued from above.)

"The aforesaid consideration is considered a partial payment.

"See correspondence from Coral Gables Imported Motor Cars, Inc., to Fiat Distributors, Inc., dated 9-16-75."

BY MR. HARRIS:

Q. Now, Mr. Rebhan, we have now had this hearing in Tallahassee. Did you finally get your Fiats?

A. Yes, sir.

Q. Approximately when did you get them?

A. November 1st, 1975.

Q. At that point had Tallahassee issued you a license to be a dealer?

A. Yes, sir.

Q. Now, at the time that you received your Fiats, did you also receive any parts?

A. Yes; I believe we received the parts right about the same time, maybe a week later, but very close to the same time.

Q. Approximately what was the total amount of parts in dollars that you received?

A. Approximately $45,000.

Q. Now, did you pay for those parts at that time?

A. No, I couldn't pay for the parts, not the full $45,000. I believe I paid $15,000 at that time.

Q. Mr. Rebhan, I'm going to hand you a document which is identified as Plaintiffs' Exhibit No. 25 for Identification.

A. Yes.

Q. Mr. Rebhan, could you identify that for us, please?

A. This is the letter that I wrote to Mr. Nelson on October 27, 1975.

MR. WARD: I have no objection.

MR. HARRIS: I would offer it.

THE COURT: Then without objection, it is admitted as Plaintiffs' Exhibit No. 25.

(Plaintiffs' Exhibit No. 25 was received in Evidence.)

MR. HARRIS: Your Honor, I would like to publish this letter. This is on Coral Gables Imported Motorcars stationery and is dated October 27, 1975.

It is addressed to Mr. W. C. Nelson, Fiat Distributors, Inc., 155 Chestnut Ridge Road, Montvale, New Jersey.

It states:

"Dear Bill:

"Enclosed is our first payment of $15,000 for parts. I thought we agreed to a much slower pay-back, to help out my cash position. We are in very bad shape because of all the delays on the Fiats, and need help.

"Very truly yours,

"C. M. Rebhan, President, Gables MOtorcars, Inc."

BY MR. HARRIS:

Q. Mr. Rebhan, now you have received your license from Tallahassee and you have received your parts; when did you receive the Fiat cars, your new Fiat cars?

THE COURT: He has already answered that.

BY MR. HARRIS:

Q. Did you have an advertising of a grand opening?

A. Yes, we ran some full-page ads in color.

We had a little direct mail piece that we had made up to import buyers that were in that zip code area around the dealership; we had 20,000 of those that we mailed out three times, three consecutive months.

The rest were just—well, we did a lot of newspaper advertising.

Q. How much did it cost you for advertising, that is, for this promotion?

A. Well, we probably spent fifteen to twenty thousand dollars the first month.

MR. WARD: I'm going to object. If he has the document, that would be the best evidence. At this point he is speculating.

THE COURT: I will let him estimate it.

BY MR. HARRIS:

Q. I'm going to present to you Plaintiffs' Exhibit No. 42 for identification and ask you if you can identify this.

MR. WARD: I have no objection.

BY MR. HARRIS:

Q. I present to you this document which is identified as Plaintiffs' No. 42 for identification and ask you if you can identify that, sir.

A. Yes, this is a flyer.

This is one of the flyers that we mailed out, that we made up, and I don't know if this was in the first month; I believe this was the first of three flyers that we mailed out.

Q. Are these pictures of some of the service bays that you had there at your location?

A. Yes, sir.

MR. HARRIS: I would now offer that in evidence.

THE WITNESS: That may have been the second or third flyer. We did three of them.

MR. WARD: I have no objection whether it is the first, second, third or fourth.

THE COURT: Without objection, received as Plaintiffs' Exhibit 42 in evidence.

(Plaintiffs' Exhibit No. 42 was received in evidence)

BY MR. HARRIS:

Q. Mr. Rebhan, did Fiat contribute or pay any money to you for this advertising?

A. No, they did not.

Q. Mr. Rebhan, is it important to a new car dealership to get off with a good start?

A. It's very important, yes.

Q. Would you explain to the jury why that is important?

A. Well, the first thing that you want to do is that you have to build up your business as fast as you can.

You've got to sell as many cars as soon as you can so that you will have that many more service people, that

many more parts people, that many more trade-ins for used cars to sell.

It's good for the morale of the people; it's very important.

Q. How about when you first started the new car dealership—is it important then to have proper capitalization?

A. Absolutely.

Q. Why is that important? Would you explain that to the jury, why it's important?

A. Well, you've got to be able to advertise.

You've got to be able to use all of the resources that are available to you so that you can sell cars and service cars.

You've got to have the money in back of you to be able to do that; you've got to be able to maybe scratch out or maybe put in a few more dollars in used cars than it might be worth.

It's very important to get the ball rolling off right.

Q. Mr. Rebhan, plus the fact that between July, in the early part of July of 1975, in the early part of November, 1975,—does the fact that you did not have new cars have an effect upon your bank, financially?

A. Yes, it has quite a bit.

Q. Would you tell the jury what effect it had?

A. Well, without the new cars to sell all we had were used cars and we couldn't get the number of used cars or the gross profit on the used cars—there was no way we could sell enough of them to offset all of our expenses or keep all of the people who were employed

* * * * *

BY MR. HARRIS:

Q. That is a total of how many cars, sir?

A. 115.

Q. Mr. Rebhan, you actually did sell Fiats from November, 1975 until you went out of business, correct?

A. Yes, sir.

Q. Based on your experiences in selling Fiats, how many Fiats should have been sold in a four-month period?

MR. WARD: Objection, Your Honor.

THE COURT: Sustained.

BY MR. HARRIS:

Q. Mr. Rebhan, what was the gross profit that was realized in this period of time from the sale of new and used cars?

A. The total gross profit—you are talking now up through October 31?

Q. Yes, sir.

A. That was forty-five thousand, approximately. I am adding two figures here together in my head.

Q. What two figures are you adding?

A. $14,658 plus $31,098. It is $45,756 or something like that.

Q. Mr. Rebhan, just for the sake of the jury, so they understand how you get those figures, would you tell us how you arrive at gross profit?

A. Right. That is the amount of the sale, the total amount of the sale, minus the cost, gives you the gross profit.

For instance, if a car is sold for $6,000 and costs, the actualy cost of the car is 5,000, the gross profit then would be one thousand dollars.

Q. Is gross profit the same as net profit?

A. No, sir. The net profit would be any other expenses involved in selling that car, deducted. In other words, you've got a thousand dollar gross profit. Then you would pay a salesman commission, the manager, the delivery expense to get the car ready, et cetera.

All other expenses would then come off that $1,000.

Q. In your history of being a car dealer, as well as while you were operating your Fiat franchise, did you take certain expenses and measure that against gross profit to determine how you were operating?

A. Yes.

Q. Would you tell us what you normally do in reviewing your financial statements?

A. It is a very common practice. What we always do, we look at an expense, as a percent of the gross profit. I think it is easier to give you an example.

Most times, a rule of thumb is, for instance, our new car sales compensation—in other words, a commission to someone pursuing a new or used car, runs approximately 22 percent of the gross profit. Therefore, on—just to give you an example, if the gross profit was $1,000, the commission would be about 220, $230.

Q. Mr. Rebhan, during this four-month period of time, up through October 31, 1975, what was the commission to salesman percentage, to gross profit?

A. The commission ran about 45 percent of what the gross profit was.

Q. Why was that?

A. Well, the main reason was, that we were selling basically used cars and new Lancias. In order to keep our salesmen, we had to pay them for a salary, plus commission. Normally, they just work on a commission basis.

We had these men there for a couple of months, where they got basically salary only. Some of them didn't have any sales at all. They might have had one or two sales, and somebody couldn't live on the commission off of one sale. It might be fifty or one hundred or two hundred dollars at most.

Q. In your experience as a car dealer over the years, as well as in the Fiat dealership, did you measure your clerical personnel to your gross profit?

A. Yes.

Q. How would you do that?

A. In fact, we do that in every department. To give you an idea there, your clerical help normally runs about three to three and a half percent of the gross profit.

In other words, if the gross profit is $100,000 again, using a rounded-off figure, the three and a half percent of that would go towards clerical help.

Q. As of October 31, 1975, what was your clerical help percentage to gross profit?

A. I believe it is about ten, a little over ten percent.

Q. Mr. Rebhan, during this period of time, in reviewing your financial statements of October 31, 1975, approximately how much was expended for legal services?

A. It is about $7200.

Q. Is that normal?

MR. WARD: Objection. It calls for a conclusion.

THE COURT: Sustained.

BY MR. HARRIS:

Q. Under the circumstances, for opening a new-car dealership, on the normal basis of not encountering any problems relative to licensing, would you have incurred $7,200 worth of legal fees?

MR. WARD: Objection. It's speculation.

THE COURT: Overruled.

THE WITNESS: I actually spent about $8,000 during that period of time in legal expenses of which about 7,200 of that went towards the Fiat situation, the legal expenses I incurred, because if we didn't Fiat, the other $800 was normal legal expenses in starting up the business; you know, applying, filling out corporate papers, and forming the corporation, things like that.

BY MR. HARRIS:

Q. Now, based upon your experience as a car dealer in the years while you were selling Fiats, what was your advertising expense?

MR. WARD: Just a moment. I'm going to object. He didn't sell them for years. He sold them for eight months, and if he wants to ask the gentleman if he has an average monthly expense for advertising, then I have no objection.

THE COURT: Rephrase it.

BY MR. HARRIS:

Q. Mr. Rebhan, based upon your experience as a car dealer and also while you sold Fiats, what would be the normal expense, percentage of gross profit for advertising?

A. Normally 10 percent.

Q. Again, in reviewing those financial statements as of the end of October, what was the actual percentage of gross profit for advertising?

A. It was a little bit—right at about 25 percent or a little bit over 25 percent.

Q. Are you able to break that percentage down into new and used cars?

A. Yes, I could. The thing of it is that we spent $4,500 in new car advertising, and what percent that is of $14,658, I don't know; it looks to me like it would be 30, 33 percent.

Q. For new cars?

A. For new cars.

Q. Normally, what would it be?

A. 10 percent.

Q. Mr. Rebhan, again, if you will go down to the interest factor on the financial statement there, and based upon your experience as a car dealer while you were selling Fiats, what was the normal rate of—not rate—what would be the normal percentage?

A. Normally, it would be, in 1975, it would run 10 percent.

Q. And what was the actual percentage?

A. 22, 23.

Q. Mr. Rebhan, going to the financial statements, is it broken down where you could see what the results of operating were for the parts and service departments?

A. Yes, sir.

Q. Now, if you will, again, based upon your experience as a car dealer as well as when you were selling Fiats, what would be the normal percentage of expenses for salary in the parts and service department, of the gross profit?

A. In the service and parts you try to keep the salaries at approximately one-third of the gross, 33 percent of the gross profit, or less, if you can;

* * * * *

Q. Now, are November and December good months to sell cars?

A. No, sir. November, December—November is not too bad. December is a terrible month.

December and January are really your two worst months to sell cars and that I know why, too.

Q. Why?

A. Because of Christmas and holidays in December and January.

Q. Do you recall how many cars were projected, new cars were projected for you to sell in 1975?

A. I was projected to 390. That was my sales responsibility, 390 for the whole year, so approximately half of that because we were only open half of that because we were only open half of '75 would be 195.

Q. In the six-months period what does that come to per month?

A. About 33 a month.

Q. Now, taking the cars that you actually sold, the new Fiat cars that you actually sold through November and December of 1975, what percentage of what was projected did you sell?

A. We actually sold more than what we were

* * * * *

Q. Mr. Rebhan, this is part of Plaintiffs' Exhibit 30 for Identification.

THE COURT: Show it to counsel.

MR. WARD: No objection.

THE COURT: Without objection, admitted as Plaintiffs' Supplemental Exhibit 30.

MR. WARD: For the record, this appears to be some accounting papers and financial statements of December 31, 1975, by Eton, Peed, et cetera, et cetera, et cetera.

THE COURT: Maybe we better make that 30-A.

BY MR. HARRIS:

Q. Mr. Rebhan, I show you Plaintiffs' Exhibit 30-A, admitted into evidence, and ask you if you would identify this, sir.

A. This is a report back from the Certified Public Accountants on the balance sheets. The financial statements of Coral Gables Imported Motorcars, as of December 31, 1975.

Q. Do you know what the loss was as shown by this, Mr. Rebhan?

A. $66,615.

Q. Do you know whether that was a certified

* * * * *

A. Yes, he told me that this was exactly like the other one, and after two or three visits, when he wouldn't leave it, at the time we got together, he said I had to sign it or else I was no longer a Fiat dealer.

They couldn't give me cars because my current agreement ran out December 31, so I had to sign it, and Christmas was coming up, and he was going away.

MR. WARD: Excuse me, Judge.

I will stipulate that nobody can sell Fiats unless there is a Fiat dealer, and you cannot be a dealer unless you have a contract.

MR. MITCHELL: He is arguing his case, now, Judge, and I strenuously object to this.

THE COURT: I will let you go ahead and exact the information. Go ahead, counsel.

BY MR. HARRIS:

Q. What did Mr. Bartlett say?

A. Mr. Bartlett told me that I had to sign this agreement if I wanted to get any new Fiats.

After December 31, 1975, I would no longer be a Fiat dealer, and they couldn't ship me Fiats.

At that time, I was at Trail Dodge. I

* * * * *

A. No, they wouldn't do it at that time.

MR. WARD: I wonder if he could tell us who is talking, when, where, what this time was.

THE COURT: All right, when, where and how.

THE WITNESS: It was approximately in early March of 1976. At that time, there was a phone conversation with Mr. Manning.

BY MR. HARRIS:

Q. Mr. Rebhan, moving on now to the time when you finally go out of business, can you tell us approximately when you went out of business?

A. You mean like the last day? When we closed the doors and quit selling cars?

Q. Let me rephrase it:

Do you file an application with the City of Miami for a Going Out of Business License?

A. Yes, I did.

Q. Approximately when did you file that?

A. Approximately July 20, 1976.

Q. Prior to that time, did you notify Fiat Distributors, Inc., that you'd be going out of business?

A. Yes, sir, I did.

Q. How did you go about doing that?

* * * * *

Rebhan—cross

Q. Incidentally, do you remember Mr. Bartlett telling you that Fiat had other applicants who wanted a franchise?

A. Yes, he did.

Q. You were trying to beat out those other applicants, were you not?

A. I applied. If I did not want the dealership, I wouldn't have applied. The terminology "beat them out"—

Q. Were you not trying to prevail over the other applicants?

A. Yes, I was.

Q. You wanted Fiat to give you the dealership and not give it to those others; isn't that true?

A. That's why I applied, yes.

Q. Mr. Bartlett said that Fiat had an open point, did he not?

A. Yes.

Mr. Bartlett told me right off the bat that we were a replacement dealer for Orange Motors of Coral Gables.

Q. Right. Isn't it a fact that at the end of about December, 1974, and maybe as late as January of 1975, Orange Motors had two Fiat dealerships in this

* * * * *

THE COURT: I'm going to sustain the objection. We have been through that area.

BY MR. WARD:

Q. You do remember a May 7th meeting when Mr. Philbrook came down from Jacksonville and Mr. Nelson came down from New Jersey?

A. Yes.

Q. And didn't they advise you at that time that they had just left Mr. Aguilar that very day and that he was still angry and upset and claimed that he would do whatever he could to stop you from getting a license?

A. Yes. They also told me that it didn't matter then because I was a replacement dealer.

They assured me of the fact that he was up there and it didn't matter. To me it was insignificant. What difference did it make—

Q. Did you call Mr. Calvin's office and see if Mr. AGuilar could make or would make trouble for you?

MR. HARRIS: Objection. He has answered the question.

THE COURT: Overruled.

BY MR. WARD:

Q. Did you call Mr. Calvin's office to see

* * * * *

Calvin.

BY MR. MITCHELL:

Q. Do you recognize what they have given you?

A. Yes, this is a copy of Chapter 1, to, 380 of the 1975 Florida Statutes.

Q. If you would, read from the pertinent section.

A. Section 320.642:

"Dealer licenses in areas previously served. The Department shall deny an application for a motor

vehicle dealers license in any community or territory where the licensees presently licensed franchised motor vehicle dealer or dealers have complied with licensees agreement and are providing adequate representation in the community or territory for such licensee. The burden of proof showing inadequate representation shall be on the licensee."

Q. Who was the licensee in layman's language, under that statute?

A. The manufacturer of the particular make of vehicle.

Q. So he is the one that comes in and has to explain why a dealer is needed?

A. If an application were delayed because of objection by an existing dealer, that is correct.

Q. We are going to talk about that in a moment. Let me check, if I may, one of these exhibits.

MR. WARD: We will make a photocopy of this page, later, Judge.

THE COURT: Fine.

BY MR. MITCHELL:

Q. Mr. Calvin, the franchise we are here about, or at least the first franchise that we are here about

today, was executed by Fiat on June 13, 1975. I'm going to ask you a series of questions, and I want to take you back to your procedures prior to that day.

All right, sir?

A. All right.

Q. First of all, I would like you to explain to the jury just what your office would do in the event that an application came in for a license as a motor vehicle dealer, and this was for an additional dealer in a particular county?

MR. WARD: Objection, Your Honor, to form.

* * * * *

MR. WARD: File it. I do not mean copied.

THE COURT: All right. Of course.

File this as Court's Exhibit 1.

MR. WARD: Thank you, Judge.

(Bench conference concluded.)

MR. MITCHELL: Would you read the question, Mr. Reporter?

(The question referred to was read by the Reporter.)

THE WITNESS: Generally, we would look to the boundaries of a given county, although there are cases in other instances where we look beyond the county line, but, in this case, we looked to the boundaries of Dade County.

* * * * *

BY MR. MITCHELL:

Q. What did you tell him?

A. WE talked about the application of the rule as it related to replacement dealers and/or an additional dealer point, over and above those that were established by an existing dealer body, by a given manufacturer, what our procedures were, how the processing of the paperwork, and so forth, flowed through the field division and also in the central office.

Q. Did you have any discussions with them relative to your interpretation of the word "county" or "territory" —excuse me, "community or territory" as it is used in the statute?

A. I would have to say to the best of my recollection that we did talk about the way we considered that to be the boundaries of a given county.

Q. And did Fiat indicate to you any intentions with respect to expanding the dealerships?

A. Yes, my recollection was that was one of the reasons that Mr. Philbrook was in to see us, that he had had in mind the expansion of their dealership group, the adding of additional dealers, not only in Dade County but through the state of Florida, and he was trying to familiarize himself with the applicable

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some time after the first of the year when this happened, I can't really remember, but the two existing Fiat dealers, Orange Motors of Miami and Orange Motors of Coral Gables, whom I recall had a common ownership, released their franchise agreement with Fiat and ceased to become a Fiat dealer voluntarily, to the best of my recollection, so there was a point in time some time after January of 1975 that there was no Fiat representative in Dade County.

Q. Did you discuss with Mr. Philbrook at this time the number of points then available for a franchise by Fiat?

A. Yes, based upon the previous franchise and license of two Fiat dealers in Dade County, there were then at that point in time, meaning the release of a franchise by the two Fiat dealers licensed—there were two existing open points at that time in Miami in Dade County.

Q. Did a time come when you had any conversation with Mr. Philbrook relative to the Coral Gables Imported Motorcars, Inc.?

A. My recollection is that he indicated that they were—they had signed or were in the process of signing a sales and service agreement with Coral Gables Imported Motors who would be filing an application for franchised dealers license with the Department.

Q. What, if anything, was indicated to you about the franchising of any other dealers at this time in Dade County by Fiat?

A. Well, prior to that time they had already franchised—

MR. WARD: I object. It's not responsive to the question.

THE COURT: Overruled.

THE WITNESS: They had franchised and we had licensed a Fiat dealer in Miami, Dade County, by the name of Autorico, Inc., and our discussion was in substance that you have one replacement out of two and if you're going to replace another one, that's still a one-for-one; you have two-for-two.

BY MR. MITCHELL:

Q. Did he ask you whether or not this would result in any protest situation?

A. I seem to have a recollection that he did, yes.

Q. What did you tell him?

A. I told him that the two-for-two or one-for-one level—that there was no increase in the number of dealer points on those that they had prevously established; and that we didn't consider that Section 320.642 was applicable and we wouldn't consider the protest.

Q. At the time of this conversation did Mr. Philbrook tell you that Fiat had franchised Mr. Ralph Hebert of Hebert Olds to do business in Dade County?

A. I have no recollection at that time that Mr. Philbrook and I discussed any licensing of Hebert Oldsmobile as far as Fiat was concerned; that didn't come up to the best of my recollection.

Q. Were you aware at that time or did you personally have a telephone conversation that Hebert had been franchised in Dade County?

A. No, I had no particular reason to be aware of the dealer license section processing the application. There was no reason—there wasn't anything unusual which was brought to my attention.

Q. Well, had you known that Hebert Olds had been franchised in Dade County, would your advices to Mr. Philbrook have been different?

MR. WARD: Objection. May we approach the Bench?

THE COURT: Yes, sir.

(Side bar conference between the Court and counsel)

MR. WARD: This is the situation—what would you have done if you had known, sir?

Now, I refer the Court to the Drackett case and under that case it is an impermissible question.

MR. MITCHELL: This is not a party. This is a witness who is talking about administering the procedures and practices prevailing, and I think he has a right to tell this jury what his practices and procedures would have been, had he been aware or advised that Hebert had been licensed.

This goes right to the heart of it.

MR. WARD: The Drackett case that we are relying on is at 1527 2d, 463.

THE COURT: I'm going to overrule the objection. I don't think this comes within the scope of the premise submitted, Court's Exhibit 2.

(Side bar conference concluded)

MR. MITCHELL: Would you read the question back?

(Record read)

THE WITNESS: Yes, sir, based on our previous discussion as to the applicability of 642 and in consideration of objections by a dealer in replacement on a one-for-one dealership, and recognizing that Autorico had been licensed and franchised and if in fact I had known that Hebert's license had been amended to include Fiat, that they had executed a sales and service agreement, I would have taken the position and so told him at that point in time that you were two-for-two—left where you were before, and that any additional points would come under the provision of our applicable rules and that the existing dealers would be notified of the application and given the opportunity to protest.

BY MR. MITCHELL:

Q. Were the existing dealers, Autorico and Hebert, advised of the application of a third dealer in a two-dealer county of a possible protest situation, as far as Coral Gables Imported Motorcars?

A. Were they advised by the Division?

Q. Yes.

A. Yes, upon the time of the receipt of the application—at the time of the telephone conversation we didn't have the application in hand. The application came in subsequently to that time, and I believe some

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do it again.

THE COURT: The objection is overruled.

(Bench conference concluded.)

MR. MITCHELL: Would you read the question back?

(The question referred to was read by the Reporter.)

THE WITNESS: Yes, there was another protest.

BY MR. MITCHELL:

Q. Can you tell me what dealer was involved and where?

MR. WARD: Objection. The document would be the best evidence.

MR. MITCHELL: I have it right here.

THE COURT: Overruled.

THE WITNESS: There was an application for a Honda franchise license that a dealer received—

BY MR. MITCHELL:

Q. Honda or Fiat?

A. Fiat, in Sanford, Florida, Seminole County, sometime earlier, say, prior to June 15 sometime; I think in March of 1975.

MR. WARD: Let me renew my objection.

This gentleman's recollection, obviously, is not completely accurate. I again renew my objection on the ground that the document would be the best evidence.

THE COURT: Overruled.

BY MR. MITCHELL:

Q. You may continue.

A. I think I concluded that we had received an application in Sanford, Seminole County, for a Fiat franchise dealer's license to be issued.

Q. And when was that application filed?

A. (No response.)

Q. Well, let me show you Plaintiffs' 31.

A. (No response.)

MR. MURRAY: It's Plaintiffs' 41.

MR. MITCHELL: While you're looking at that, Mr. Ward, where was this dealership to be located?

THE WITNESS: In Sanford, Florida, Seminole.

BY MR. MITCHELL:

Q. And where is Sanford located; what county?

A. Seminole County.

Q. Was this dealership protested?

A. Yes, sir.

MR. WARD: Objection.

THE COURT: I don't think you can go beyond—are you going beyond that?

MR. MITCHELL: Well, I will ask him about the protest, what happened, who protested, and that's it.

THE COURT: Well, I'm going to allow it under Rule 404(b) and the other bases, going to knowledge.

Gentlemen, approach the bench.

(Bench conference out of the hearing of the jury:)

MR. TRAYNOR: Your Honor, this exhibit which we have, P-49, was listed on the exhibit list that we got on Friday afternoon.

Now, we have seen this document before, I will concede, but it never previously had been listed by the plaintiffs, indicating that they intended to use it in any pretrial exhibit list until we got it Friday afternoon.

MR. MITCHELL: Your Honor, they were listed in our original pretrial stipulation, and this was testified to by Mr. Calvin, was identified, and if you look on the back, it's got his name.

Now, I don't know much – I don't know how they can complain about that. We never got their list to this day. I don't even have a list of what they're going to use in the case.

THE COURT: Again, you're trying to establish through this type of testimony knowledge?

MR. MITCHELL: Yes, sir.

THE COURT: Which goes to Rule 404(b); do you really need this exhibit?

MR. MITCHELL: It has to do with correspondence. I'm going to ask him if Fiat was aware of this. I really don't need the exhibit, but if I can just follow through.

THE COURT: All right.

(Bench conference concluded.)

BY MR. MITCHELL:

Q. The application for the Auto Dealer's license was for what county?

A. Seminole County.

Q. Do you remember the name of this proposed dealer?

A. I believe it was Seminole Motor Company or something like that.

Q. And was this protested?

A. Yes, it was.

Q. Who protested it?

A. A dealer in Winter Park, Florida by the name of Bill Bryant or Bill Bryant Motors.

Q. And when was the protest made, approximately?

A. It would have been either March or April of 1975, following the receipt of the application.

MR. WARD: Objection, Your Honor.

THE COURT: You want it in evidence?

MR. MITCHELL: Yes, sir.

MR. WARD: Your Honor, I don't think it should be in evidence. I think it should be testified to under the rules of evidence.

THE COURT: I'm going to sustain the objection to its being admitted in evidence.

Well, he may refresh his recollection.

BY MR. MITCHELL:

Q. Take a look at that exhibit, P-41, please.

A. Yes, sir.

Q. Do you recognize that exhibit, sir?

A. Yes, sir.

Q. Does that help to refresh your recollection?

A. Yes, it does.

Q. Can you tell me when the proposed Seminole Motors dealership was protested?

A. It was protested by a letter dated April 3, 1975, from Bill Bryant Imports.

THE COURT: Now, don't get into the contents. You have already answered the question.

BY MR. MITCHELL:

Q. Where was Bill Bryant located?

A. 1001 North Orlando Avenue, Winter Park, Florida.

Q. And what county is that in?

A. I believe that's in Orange County.

* * * * *

tunity to see the premises that were ultimately utilized?

A. Yes, sir.

Q. Did you take him through them?

A. Fred Couch drove him over to the facility and they went through it, drove a car around it.

Q. Yesterday on your examination, there was some discussion about a meeting with Mr. Philbrook right towards the end of May, I believe, approximately May 29, 1975, where there was some discussion concerning a Mr. Aguilar being upset.

MR. WARD: Objection. I don't think that's completely accurate. My reference was to a May 7th meeting.

THE COURT: Do you stand corrected?

MR. HARRIS: Yes, sir, May 7th; was there some discussion relative to Mr. Aguilar being upset at that time? Did Mr. Aguilar say anything to you about a protest?

THE WITNESS: No, sir, at that meeting there was Mr. Philbrook and Mr. Nelson and Mr. Bartlett, all three from Fiat, and they came over to Trail Dodge, my office, where I was; they just left Mr. Aguilar at Autorico, and they told me that he was very upset, they thought, you know, and they kind of laughed at it, said that it didn't matter because I was a replacement dealer, and the fact that he was upset didn't matter.

Q. Did you understand the point system, that is, open points concerning the application procedure, when you were told that you would be a replacement dealer by Mr. Philbrook or Mr. Nelson?

A. I don't quite follow you. Would you repeat that question?

Q. Well, I will rephrase it.

Was there any discussion about open points at the time that you were told that you would be a replacement dealer?

A. No, sir, the only thing that we talked about was that I was a replacement dealer for Orange Motors of Coral Gables. That's all.

Q. Now, there was some discussion yesterday about when you first opened up a business in the early part of July, about the monies that you put in the corporation. Did you recall that you testified yesterday concerning something about borrowing of $100,000? Was that money, in fact, borrowed?

A. That money was borrowed from the Royal Trust Bank but I had to personally sign on that money

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THE COURT: Yes, sir. Who is Mr. Garfield?

MR. MITCHELL: An officer, director and I believe a general counsel for Fiat.

THE COURT: Go ahead.

MR. MITCHELL: We will proceed.

"Q. Would you state your name and address and occupation?

"A. My name is Edward Garfield. I'm an attorney. I am the Secretary of Fiat Distributors, Inc., and a member of the Board of Directors. I reside at 1025 Fifth Avenue, New York City. My law office is located at 437 Madison Avenue, New York City.

"Q. Are you active in connection with the activities of Fiat, sir?

"A. Well, I am general counsel for both the Fiat Distributors, Inc., and its parent company, Fiat Motor Company, Inc., which is an American company, acting as a consultant, and I am also the United States counsel to Fiat, SBA, the Italian company that manufactures Fiat automobiles.

"Q. Fiat has been imported in this country since about when, Mr. Garfield?

Garfield—depo

"A. Since about '57. We started early in 1957.

"Q. Have your sales of Fiats been increased or are they decreasing?

"A. Well, I would say they have been increasing at an ever increasing rate, and that this year, for example, we have budgeted the sale of 100,000 Fiat cars in the United States.

"At the present moment we are right on target and we have every reasonable cause to believe that that goal will be achieved.

"Q. In order to achieve that goal, has there been any consideration given by Fiat to enlarging your dealer network?

"A. Yes. In view of the fact that we expect and anticipate, or are planning on increasing our sales in the

United States very much beyond that figure—actually, our projection is within the next few years to increase our sales to 200,000—so we have to increase our dealer network.

"Q. Do you have any knowledge as to how your experience in Florida's market has been in relationship to the national market?

"A. Yes. I have worked on that from time to time in the past several years, and Florida as a state is lagging behind the national market, and Dade County is lagging behind the State of Florida to a still greater extent.

"Q. Now, have you experienced thus far any difficulty up through 1975 in attempting to expand your dealer network system in Dade County?

"A. Yes, we have. We have had very trying difficulties. For a number of years we have been trying to get more dealers in Dade County, but—"

There was an objection there.

MR. WARD: The next question is at the bottom of the page, Line 25.

MR. MITCHELL: Thank you.

"Q. Mr. Garfield, would you—is that your best estimate—

"A. No, that is my best recollection. I don't know the specific dates. I wouldn't know that because I only have an overview of

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I think one was on January 14th of this year and the other one was relinquished on the same day, but to become effective within 30 to 60 days, and I think actually became effective in 30 days. So I would place that date at February 14, 1975.

"Q. Contemporaneous, or approximately contemporaneous with those events, were there any dealings, to your knowledge, between Fiat and a company called Autorico of San Juan, Puerto Rico?

"A. Oh, well, yes. Autorico of San Juan is a company, the principal of which is Armando Aguilar. His brother, Alberto, is also a participant in that enterprise.

"Q. What is that enterprise, very briefly, sir?

"A. Well, I think it will require that I go back. Fiat Motor Company, Inc., which is the parent company of Fiat Distributors, Inc., was the imported distributor of Fiats in Puerto Rico.

"It concluded that it didn't want to be in the automobile business. It wanted to

* * * * *

"A. No, sir."

MR. MURRAY: Drop down to Line 19.

"Q. Now, the application then was signed—Where were you located at that time; were you at 3450 Northwest 36th Street, or were you on 27th Avenue opposite—

"A. When I signed the original application?

"Q. Yes, sir.

"A. I was on 3450 Northwest 36th Street.

"Q. When that was signed, did those facilities at 36th Street offer the physical size, service bays, and all of this we have heard about today?

"A. No. It was very crowded.

"Q. Now, did you have any discussions with Mr. Nelson or Mr. Crawford that the creation of Autorico would be an exclusive Fiat dealer?

"A. Yes, sir."

MR. MURRAY: It looks like Page 161, Line 7.

"Q. Did they give you these printouts of the sales of Orange Motors of Coral Gables

* * * * *

"Mr. Nelson told me, Mr. Crawford told me, had a very sad image, and they were not selling cars. The customer complaint was quite high.

"Q. Now, in your conversations with Mr. Crawford about your considering additional stores in the future, did you have any conversations with them as to what time was involved and how much more work was to be done to try to salvage Fiat's name, prior to your commencement as Autorico?

"A. He said we had to know the market first. That, we talked about.

"Q. Did he agree with that?

"A. I don't recall.

"Q. Did he disagree with that?

"A. No.

"Q. Now, up—lest I forget, did you receive this from Fiat?

"A. Yes, I did.

"Q. This contains many of the problems pointed out by Fiat with the dealership?

"A. Yes, sir."

MR. MURRAY: Page 169, Line 11.

* * * * *

I believe the testimony was that you went to his other place, Trail Dodge.

"A. I went to Trail Dodge, yes.

"Q. What were your conversations there?

"A. Well, I wanted to—first of all I wanted to meet him personally, and know him, and I asked him for advice, whether he could come up with any idea, because we thought we were doing things the right way, and all of a sudden this happened to us, and he said if there was anything we could do, or how it had been proposed to him—I had explained to him the way this had been offered to me in Nelson's office.

"Q. In Nelson's office?

"A. Yes. The way the Fiat deal was offered to me—the Miami Fiat deal was offered to me in Nelson's office. This, I explained to him.

"Q. Were there any discussions about that you had not had sufficient time to develop your dealership?

"A. Of course; yes, sir.

"Q. What did you—what were your feelings

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Then counsel said:

"He said yes."

Now, page 219, line 3:

"Q. What ideas do you think he should have had?"

Well, let's go to the bottom of page 218.

"Q. You talked about conversations you had with Mr. Rebhan and you asked him what ideas he had. Do you remember that?

"A. Yes.

"Q. What ideas do you think he should have had?

"A. I don't know. Possibly when I told him exactly how the whole thing happened and how it had been offered by Orange Motors stores in Miami and how I had been promised 'you can have all of Dade County,'—my explaining to him of exactly what happened; I thought that he could come up with an idea that it was not possibly good for him in that location, and he would move into another location or that that was not a nice way of doing business

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Aguilar—depo

Now, page 225, beginning line 9:

"Q. Do you recollect the time you said you were in Mr. Nelson's office, at the time Mr. Nelson made some promises to you?

"A. Yes, sir.

"Q. Was Mr. Garfield present?

"A. Yes, sir.

"Q. What kind of promises did he make?

"A. He said, 'you go down to Miami, buy the Orange Motors stores, and you can have the whole situation in Miami.' Whatever that meant, and Alberto was there with me, sir.

"So I did and it was a fast—real fast thing. It happened right away."

That is the end of it, Your Honor.

* * * * *

Bartlett—depo

as a multiple point franchise market.

"Q. Can you tell us whether there is anything in that agreement that Mr. Aguilar has signed with respect

to the distance other Fiat distributors had to be situated away from his Autorico location?

"A. Other Fiat dealers, three miles.

"Q. How many miles is the proposed Fiat dealership with respect to Mr. Rebhan?

"A. Five miles.

"Q. Does it also indicate that Autorico is a non-exclusive dealer?

"A. Yes."

Page 18, please.

"Q. Now, sir, do you have any knowledge as to whether Autorico had committed any violations of his contract with Fiat? My question stands, any violations in the contract?

"A. I know of violations, yes, sir."

Page 19:

"Q. Now, sir, would you tell us what they

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"Q. Now, I invite your attention to Autorico's own exhibit, Exhibit No. 3, which are certain portions

of the Yellow Pages from the current Miami telephone directory, and ask you if looking at these Yellow Pages you can detect any violations committed by Autorico in respect to the provisions of Page C-3 of the contract.

"A. I am looking for this, sir.

"Q. What page of the Yellow Pages, sir?

"A. Page 149, 'Automobiles.'

"Q. All right.

"A. In the lower lefthand section of the page there is an illustrated advertisement by the dealer.

"Q. That would be the same as this one; right?

"A. Yes, sir.

"Q. Go ahead, please.

"A. No, I am sorry. The lower middle righthand section. Yes, first of all, Lancia is in there, indicating that the Lancia franchise is there. Secondly—Miami Fiat is used, and it is called a trade name or a firm name.

"Q. All right, sir. The contract says what in that regard?

"A. 'The dealer may use the word 'Fiat' or any other name—trademark or trade name adopted for use by Fiat, SBA, FDI, or by its subsidiaries, either.

"In connection with that and for the purposes of identification, advertising, sale and merchandising of Fiat, or FDI product, you shall not use the word 'Fiat' or any other name, trade name or trademark adopted by use from SBA, FDI, or subsidiaries, or the contained word or combination containing any of such words, and the name under which a dealer conducts its business.

"If a sole proprietorship or a co-partnership, or in the name of the dealer, or if a corporation, it says, 'You cannot use the word 'Fiat' by an individual dealer.'

"Q. Now, do you recognize this piece of paper?

"A. Yes, sir.

"Q. Tell us what it is, please, and where you got it.

"A. I got it from Autorico. It was what they call a Motorgram or Mailgram that they send out to the customers in the area, simply telling them that they were there at that address, who the people at the dealership were for them to contact in case of service, business management, overseas delivery, and that sort of thing.

"I commented to them that I thought it was a clever idea. It was a good piece of advertising, but the Miami Fiat was used as the identification rather than the true name, Autorico.

"I warned them that—and advised them that they can't use the Miami Fiat in that text. They have to use their proper name, besides the fact that advertising the Miami Fiat was confusing to the potential customers in that they didn't know whether the dealership was Miami Fiat or Autorico, or where they should go or whatever.

"Q. I show you Page 636 of the current Miami White Pages, telephone directory, and I

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"A. Yes.

"Q. Did they promise to stop doing it?

"A. I can't remember whether they promised to stop using it. I asked them to.

"Q. Did they recognize that it was wrong under the contract?

"A. Yes, he did. Well, he recognized that it was wrong. Whether Mr. Prez, the person I brought it to, who was an officer of the company, whether he actually recognized it was a violation of the contract—I brought it to his attention that it was.

"Q. Well, did he say it wasn't?

"A. No.

"Q. He didn't dispute you, did he?

"A. No.

"Q. Are they still doing it?

"A. Yes, to my knowledge.

"Q. When did you first bring all of this to their attention?

"A. Just in the regular course of business through the contacts; probably as early as – in fact, I am sure it was as early as February and March.

"Q. Of 1975?

"A. Yes, sir.

"Q. Which would have been about four months before the June 23rd Yellow Pages deadline, as I think testified to by Mr. Rebhan; right?

"A. Oh, yes.

"Q. Has Mr. Aguilar stocked a requisite number – strike that.

"Is there a requisite number of cars for him to stock at his location, pursuant to the terms of the agreement?

"A. Yes, sir.

"Q. What is that, please?

"A. 70 units.

"Q. Does he do that?

"A. No, sir.

"Q. Have you talked to him about it?

"A. Yes, sir.

"Q. Tell the gentlemen the substance of your conversation and about what took place and who was present.

"A. Of course, that—the stocking requirements are necessary, especially in the past, in the light of the fact that there hasn't been other representation.

"So we needed at least for them to carry minimum stocking requirements, and this was continuous from the very beginning right on through today, through telephone conversations, through personal contacts, and I have my contact reports on that sort of thing; we have—I don't ever recall the stock being greater than 50 or so units, when they should in fact be 70.

"The opportunity was there to purchase the cars to maintain the stock at that level. The dealer chose not to keep it at that level.

"Q. Have you ever—had you discussed that with him?

"A. Oh, yes, almost regularly.

"Q. What did he say?

"A. Well, I have—we were talking about the '74 automobiles earlier. I didn't start recording—

"Q. You mean model year '74?

"A. Model year '74 into the current year '75 calendar year. I didn't record any car

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cars were completely sellable.

"They were used by a movie company for a couple hundred miles or something likethat.

"Q. How many salesmen does Autorico have?

"A. Last month—last visit, which was a couple of weeks ago, three salesmen—three retail salesmen.

"Q. Is that an appropriate number?

"A. No, sir.

"Q. Why not?

"A. The contract calls for six salesmen, six retail salesmen.

"Q. The contract that Autorico signed?

"A. Yes, sir, and the reason—let me qualify the six salesmen. We didn't arbitrarily reach a figure that he needed six salesmen to be a Fiat dealer. For his planning potential it was 396 units, that is assigned to him in the contract.

"He needed six salesmen to retail those units during the course of 1975. Now, how he arrived at that, we figure each salesman should sell eleven units a

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"A. Certainly.

"Q. What about the—"

There is some more colloquy.

Page 33 at the top.

"Q. Do they have a used car sales manager there?

"A. No, sir.

"Q. Are they supposed to under the contract?

"A. Yes, sir.

* * * * *

as he should. The dealer's average runs about $68 per new car retail.

"The average in my zone is running a little better than a hundred dollars per car. There is some $6,000 not used in the co-op account of which half of that we matched.

"Q. So he hasn't even spent the money you put in?

"A. No, sir.

"Q. Is that correct?

"A. That's correct.

"Q. In your judgment are you receiving adequate or inadequate representation from Autorico?

"A. You are asking me in the sales area, inadequate.

"Q. Why?

"A. Simply, we are not running at the pace that we should against the sales objective, and certainly with

the market as open as it is down there, with no competition in the adjoining market areas—in other words, he is not meeting his planning

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Petrozelli—direct

Q. Who were these people?

A. One was Mr. Sivik and the other was Mr. Philbrook.

Q. Can you tell us approximately when it was that they came down?

A. It would have been some time after we opened, prior to us receiving the cars.

Q. Well, when did you get the cars, Fiat cars?

A. I believe it was either the end of October or beginning of November, 1975.

Q. So your conversations or your discussions with these people would have occurred after the protest letters but before you got Fiat cars?

A. Yes.

Q. Now, tell me what discussions you had with these people.

First of all, where did they take place?

A. In Miami.

Q. Okay.

Now, tell me what was said.

A. Well, basically, these that they had come down was to gather the expenses which the firm had incurred up to that time, what our monthly expense estimate would be.

Q. Did you furnish any information in connection with this request?

A. I worked up the figures, worked up a balance sheet and expense tables.

Q. Did you ever give them any future projections?

A. I gave them monthly estimates, I believe.

Q. Estimates of what?

A. What our expenses would be for an average month.

Q. Did you have any further contact with these men other than during this series of events?

Petrozelli—direct

THE COURT: Now, let's determine how many times he met with those people.

BY MR. MITCHELL:

Q. How many times did you meet with them?

A. WEll, with Mr. Sivik—I believe that was the only time for Mr. Sivik.

Mr. Philbrook came down some other times after that but for that particular expense situation, it was that one time.

Q. And during the time that Mr. Sivik and Mr. Philbrook were there inquiring about expenses, did

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Bartlett—depo

"MR. CALVIN: It doesn't have anything to do with whether you are dealing with one dealer or five dealers?

"THE WITNESS: No, sir. Our base salary, I am sure is different from Zone Manager to Zone Manager. I am sure that their commissions and bonuses between the zones that would be different, but I don't think—

"MR. LEIB: If you don't, that is fine.

"MR. CALVIN: You don't get a special bonus or consideration for signing up a new dealer?

"THE WITNESS: Well, the only reason I hesitate—it doesn't matter to me whether I say or not, but, I have dealers in the room present and I think it is kind of embarrassing for me to tell what my dollars and cents are or if that is an incentive. I wouldn't sign Mr. Rebhan because I was going to make a couple of dollars out of it.

"Q. That is precisely why I wanted to get it in the record, because it can affect a person's testimony.

"A. Which way should I answer the question?

"MR. CALVIN: We are not asking for dollars and cents.

"THE WITNESS: Is there an incentive program?

"MR. CALVIN: Yes.

"THE WITNESS: Yes, there is.

"BY MR. LIEB:

"Q. Now, this telegram—I don't recall the number it was marked in there—that was sent out by Autorico, did you compliment him on this many times?

Bartlett—depo

"A. Well, at least one occasion. I may have mentioned it a couple of times. It was a good idea and I told him that.

"Q. On July 22—is that the letter you wrote to Mr. Aguilar of Autorico, complimenting him and thanking him on their performance and helping move you up in the zone and sales and so forth?

"A. I don't think it was referring to me personally. What this letter is to Mr. Aguilar is—I did. I thanked him for his efforts. I have in no way been trying to

* * * * *

Silveria—depo

"The third line we have, again, Fiat, 4.3 percent.

"4.3 percent is indicative as to what Fiat sales have been as a percentage of total import car sales the first six months of 1975.

"Q. In Dade County or the United States?

"A. I beg your pardon?

"Q. In Dade County or the United States?

"A. In Dade County alone.

"Now, each segment—you see, this is broken apart. I think you all understand that. I named only for that particular segment in Miami—contrast Miami C had 428 imports sold in 1974, of which 2.8 percent were Fiats.

"In 1975, for the six months, Fiat enjoyed 3.3 percent of the import car market.

"At this moment I think it may be proper if I would show the growth of Dade County in 1975. Here we list the total import percent of industry for the year 1974. The total import car sales in the United States represented 15.7 percent of all total cars sold in the United States.

"In Florida this figure was fairly consistent. It also represented 15.8 percent.

"Dade County showed, though, a reduced percent of this. They showed 13.1 percent of all cars sold in Dade County in 1974 were import cars.

"Now, we move onto the next column where we see 1975, the first six months. Again, all statistics taken from R. L. Polk.

"The national percent of import car sales now has increased by 28 percent to a total figure of 20.16 of the total car market.

"Florida shows an appropriate increase very consistent with the national figures, and they show 20.86 percent of the first six months, or a 32 percent increase.

"Now, we come to Dade County. Very interestingly here, we see a tremendous change in the registering of import cars, automobiles, from 13.1 percent to 20.5 percent, or an increase of 53 percent.

"Now, we are well aware that, of course, the national figures, the increase in import automobile sales, primarily because we are offering the public a vehicle that is an economy vehicle and certainly is enjoying high mileage per gallon of gas. Thus, with the increase of gasoline, we have had a lot more people desiring to buy cars that they can travel farther at less money.

"Now, Fiat's percent of the import industry for the same period that we are talking about in 1974, we had a 5.1 percent nationally of all sales in Florida, which was consistent and has been consistent with Florida for a good many years, but we have not stayed up with the national percentage of our sales.

"Florida shows 3.6 percent of the total import cars that were sold in 1974. Dade County shows a 2.7 percent of all cars sold in Dade County were Fiat automobiles in 1974.

"We move over now to the next column; we see Dade County again compared to this 1975 first six-months period; we see that the 5.9 percent is for a national, for a 15 percent increase.

"Florida shows an increase of 11 percent for a total of 4.0 percent.

"Fiat sales remain the exact same at 2.7 percent or a zero percent increase of sales in the first six months of 1975.

"When we are looking at these markets again—when we are looking at the markets to designate trading areas, again, it is a very consistent agreement with all marketing strategists in the automobile industry that there are a very number of complex, undefinable reasons that might play a part of the declaring of a marketing area. Some are related to you, depending on the income, and that type of surrounding has a bearing on it.

"Now, there is another thing that we must be very concerned about. Those of us that plan for the future, we must have to look for positioning dealerships in locations that are not only easy and accessible to sell a vehicle, but primarily easy and accessible to have the vehicle serviced.

* * * * *

A. He told me that he had previously cleared us being put in there by phone, by Mr. Calvin; that they owned the point, that they had a dealership there for years, and that we were going to replace that and Mr. Calvin told us it was no problem.

In fact, I sent a letter in with the license application, recapping that conversation that he had had with Mr. Calvin and once these letters hit, sir, it—

Q. Let me show you Plaintiffs' Exhibit 19, and ask you if you can identify that. Is that the letter that Mr. Philbrook sent to Mr. Calvin?

A. This is the letter Mr. Philbrook sent down, that we included with our license applications to Mr. Calvin.

Q. You have seen that letter before?

A. Yes, sir.

Q. What did Mr. Philbrook say to you when you started telling him, "Brooks, we got a problem."

A. At that time he told me not to worry about it, that he would get with the State; he was sure there was a mixup over there and he would get with Mr. Calvin and get it straightened out, that his letter of protest wouldn't apply in this particular situation.

* * * * *

it that you got the Fiats to sell?

A. I couldn't give you that exact date.

It was sometime down the road. I would say a good 90 days, 120 days.

Q. All right. Did your dealership have any cars to sell?

A. Yes; we had Lancias.

We went ahead and signed the franchise agreement for Lancias, which was no problem there, because there were no other Lancia dealers in the city.

Q. How long did it take to get Lancias to you from the time that you had a deal with Fiat, until they came?

A. Well, just a couple of—two or three days, they came right down. In fact, he went out of his way. He did a very good job in getting those cars.

Q. And what about the used car business? Did you indulge in any of that?

A. We immediately had to get into the used, had to get into the used car business to have any type of numbers to sell—as to the Lancia, of course, it was a more specialized product, and it's something you're not

going to sell a big volume of, and we immediately went out on the street and started buying all the

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small weekly salary and a percentage of the profits.

And, consequently, I couldn't make the money there to take care of my family, and I had to leave for more money.

Q. What happened, if you know, to the used car sales, imported motorcars, after the Fiats arrived? And when I say "used car sales," I'm talking about Coral Gables Imported Motors.

A. By the time we got the new cars, new Fiats in?

Q. Yes.

A. Our capitalization had dwindled to the point that once the new car sales started, well, we had to practically get out of the used car business.

Q. Can you explain that to the jury, please?

A. We didn't have enough capital on hand to own the used cars and now we had a floor plan, and I can't even recall the exact amount of money that we arranged to floor-plan the new cars with.

Now we had money in used cars that were flor-planned when the new cars came in, and we had to get out of the used car business and use that floor plan for the new cars, and we didn't have the capital left in the business to own the used cars, so, consequently, we were basically out of the used car business when the new cars came in.

Q. How did you get rid of them when they came in?

A. How did we get rid of the used cars?

Q. Yes, sir.

A. We retailed everything we could at very low prices, and then wholesaled the rest.

Q. Do you recall any conversations with any representatives of Fiat relative to additional advertising monies that were going to be furnished by Fiat to the Coral Gables Imported Motorcars to help them get off the ground after they got these Fiats?

A. Well, Mr. Nelson—he was the sales manager, I believe national sales manager for Fiat at the time, and he promised Mr. Rebhan and myself that one of the things that Fiat would do for us at the time we got the cars was to give us an extra 10,000 in initial advertising money, to spend on advertising the cars once they were able to ship them.

Q. And did that money ever come to you, if you know?

A. To my knowledge, no, sir.

MR. MITCHELL: Your witness, sir.

* * * * *

BY MR. MITCHELL:

Q. Did you ever have any discussions with Mr. Calvin wherein he advised you that the surrounding dealers, both within or without a territory or a county, could file a protest against a new dealer?

A. He mentioned trade area and—trade area, yes, and could go over a county line.

Q. And the reason that you did not bother to tell Mr. Calvin about Hebert Olds was because you considered that to be a different trade area; correct?

A. Certainly, yes, and Mr. Calvin had just previously licensed Hebert Olds, so he was well aware that Hebert Olds was a Fiat dealer.

Q. And if Mr. Hebert was in a different trade area, why did you go to him before you signed up Mr. Rebhan

and request the letter of no protest as to an additional dealership for Mr. Rebhan?

A. Just as a matter of insurance. If we could get that, there would be no question at all.

Q. Well, Mr. Hebert didn't give you that letter of no protest; did he, sir?

A. No.

A. Which conversation?

Q. When you talked to Mr. Calvin about licensing my client and you did not tell him about Mr. Hebert, and you knew that Mr. Hebert would not execute a letter of no protest, didn't you, sir?

A. I can't say that that's true; no, sir. I don't know the dates that Mr. Hebert was contacted for a no protest letter.

Q. Well, he was certainly contacted for a no protest letter prior to Mr. Rebhan signing on the dotted line, was he not?

A. Prior to signing?

Q. Yes; prior to May 14, 1975.

A. I would have to say he probably was; yes. That's not prior to a conversation with Mr. Calvin.

Q. As a matter of fact, Autorico had been contacted for a letter of no protest prior to May 19th or May 14th of 1975, hadn't they?

A. Many times.

Q. And that was one of the reasons that Mr. Nelson had to come down the very day that he saw Mr. Rebhan, wasn't it?

MR. WARD: Would co-counsel lower his voice, Your Honor?

THE COURT: It would be helpful.

BY MR. MITCHELL:

Q. Now, that was one of the reasons that you asked Mr. Nelson to come down, wasn't it?

A. I asked Mr. Nelson just to come down as I testified a moment ago, to help calm all of this down in order to keep peaceful relations in a dealer area.

Q. Now, you knew at that time that Mr. Aguilar would not execute a letter of no protest, didn't you?

A. Yes, sir.

Q. You had already asked him and he had turned you down?

A. That's correct.

Q. And you had hoped that he wouldn't turn down Mr. Nelson, didn't you?

A. Yes.

Q. And that was discussed on that occasion when Mr. Nelson came down, wasn't it, with Mr. Aquilar, the fact that he wouldn't give a letter of no protest?

A. Mr. Aguilar said he would protest just as hard as he could, any way he could.

Q. I would assume at this point that you had some reservations as to whether or not Mr. Rebhan's

* * * * *

A. Yes, I did.

Q. This was after they were selling Fiats, of course?

A. Yes.

Q. Why did you do that, sir?

A. Because I recognized the problem that they had at the time, and got them off COD when I found out that they were put on.

Q. You recognize that Mr. Rebhan had cash flow problems stemming from the lack of Fiats to sell, did you not, sir?

A. I recognized that he had cash flow problems; yes.

Q. You recognized that these cash flow problems came from a lack of automobiles to sell; did you not, sir?

A. It partially came from that; yes, sir.

Q. Did they partially come from that or did they all come from that, sir?

A. I'd say they all came from that.

Q. Do you remember when your deposition was taken in July of 1976, Page 63?

A. Yes.

Q. Beginning Line 15, or, actually, we better start up at 13.

"Q. To your knowledge, do you know if they are having financial difficulties?

"A. They have suffered some losses this year.

"Q. My question to you is, do you know why they have suffered losses?

"A. They haven't sold enough cars."

MR. WARD: Your Honor, I object. The witness was asked about the absence of Fiats in 1975, and then he reads from a deposition about not enough Fiats being sold in 1976, which is a different time frame, a different topic and different reasons. It is not an impeachment of anything that this witness has said.

THE COURT: I will sustain the objection on the last ground.

BY MR. MITCHELL:

Q. There is no question, as you sit there, sir, that the failure to have Fiats to sell contributed in some portion to the demise of this dealership, did it not?

A. It certainly had something to do with it.

APPENDIX F

FIAT

DEALER SALES and SERVICE AGREEMENT

FIAT DISTRIBUTORS, INC.

FIAT DISTRIBUTORS, INC.

DEALER SALES AND SERVICE AGREEMENT

AGREEMENT, effective as of the 13 day of June, 19____ by and between Fiat Distributors, Inc., a New York corporation, with principal office at 155 Chestnut Ridge Road, Montvale, New Jersey, hereinafter referred to as "FDI", and

CORAL GABLES IMPORTED MOTOR CARS, Inc.
Name of Dealer

a FLORIDA
State

a corporation ✓ a co-partnership _____
an individual _____ a limited partnership _____
doing business as _____
Name

of 3199 CORAL WAY MIAMI
Number and Street City

County DADE State FLORIDA Zip 33135
hereinafter referred to as "DEALER".

BASIS OF AGREEMENT

FDI has the right in the United States (including Hawaii and Alaska) to distribute, use, sell and service Fiat motor vehicles and components, parts and accessories therefor. These motor vehicles and parts and accessories therefor are sold to the public and serviced primarily by authorized dealers. FDI and Dealer recognize that Fiat motor vehicles over a period of years have earned the good will of the motoring public. FDI and Dealer further recognize that the success of the distribution and sale of such motor vehicles is dependent upon the continuation of this good will and that, in order to maintain and further this good will, FDI must distribute only quality Fiat motor vehicles to quality dealers, and Dealer must sell and service such vehicles under fair policies and courteous practices.

In order that the public, FDI and each of its dealers will obtain the maximum benefit from the method established by FDI for the sale of Fiat motor vehicles, it is necessary that dealers be selected who enjoy good reputations in their respective market areas and possess facilities and personnel in keeping with the sales potential in such areas. It is expected that each Fiat dealer will adopt and follow sound business practices in order to fully develop the market for Fiat motor vehicles in his sales area.

FDI will provide extensive sales and merchandising programs designed to assist dealers in merchandising and servicing of motor vehicles, parts, accessories and equipment. Experienced sales, service and parts specialists of FDI are available to assist Dealer and to provide

counsel and advice toward the conduct of his dealership on a successful basis.

This Agreement is intended to set forth in a clear and understandable manner the terms and conditions under which Dealer and FDI agree to do business together and to set forth the responsibilities of each to the other and to the public. By fully assuming such responsibilities and through cooperative effort, each will benefit from public good will and the resultant business success.

IN CONSIDERATION of the foregoing and the mutual agreements herein contained, the parties hereto agree as follows:

FIRST: As used in this Agreement, the following terms shall have the following meanings:

(1) **This Agreement** shall include this Dealer Sales and Service Agreement and the accompanying Standard Provisions, Dealer Operating Requirements Agreement, and the FDI "Warranty Procedure Manual".

(2) **Fiat S.p.A.** is the Manufacturer of Fiat Vehicles; it is a limited company organized and existing under and by virtue of the laws of the Republic of Italy.

(3) **Fiat Passenger Car** or **Vehicle** shall mean any new passenger car bearing the trade-mark or trade name Fiat.

(4) **Parts and Accessories** shall mean new parts, components and accessories manufactured for or by FDI, designed primarily for use on Fiat Passenger Cars and distributed by any subsidiary or Parts Depot of FDI.

(5) **FDI Products or Fiat Products** shall mean new Fiat passenger cars, parts and accessories therefor, and tools and equipment therefor, and other products which from time to time may be offered by FDI to Dealer for resale under this Agreement.

(6) **Dealer Price** shall mean, with respect to each Fiat Product or FDI Product to which it refers, the price to Dealer for such Product as from time to time is established by FDI.

SECOND: Subject to and in accordance with the terms and conditions hereof, FDI will sell to Dealer and Dealer will buy from FDI, Fiat passenger cars, parts and accessories, and other FDI Products, on a non-exclusive basis, and Dealer will have primary responsibility for the promotion and development of the sale of such products in the following area:

CITY OF MIAMI
COUNTY OF OR PARISH OF DADE
STATE OF FLORIDA

provided, however, that in any area which has been designated by FDI as a multiple point franchise market, FDI will not enter into a Dealer Sales and Service Agreement with another dealer within a radius of three miles of normal direct driving distance from Dealer's principal office as above stated, and in other areas within five miles thereof, unless such other dealer has been operating under a Dealer Sales and Service Agreement prior to date of this Agreement.

This area has been designated by FDI as a Multiple Point Franchise Market.

Yes ✓ No ____

The area described above cannot be altered except by written notice to or written agreement with Dealer.

THIRD: The accompanying Dealer Sales and Service Agreement Standard Provisions, Dealer Operating Requirements and FDI "Warranty Procedure Manual" which have been read and agreed to by both Dealer and FDI are hereby made a part hereof and are incorporated herein with the same force and effects as if set forth herein in full.

FOURTH: This Agreement has been entered into by FDI with Dealer in reliance upon and in consideration of the personal qualifications and representations with respect thereto of the following named persons who actively and substantially participate in the ownership and/or active management of Dealer.

Name	Address	Percentage of Ownership	Title
Charles Rebhan	Miami, Fla.	100%	Pres.

Except as may be otherwise provided in this Agreement, neither Dealer nor the persons named above shall permit any change in the ownership or active management of Dealer without the prior written approval of FDI.

FIFTH: FDI hereby approves the following locations for Deale 's business pursuant to this Agreement; a salesroom at 3199 Coral Way facilities

for the sale of used cars with space provided for used Fiat passenger cars at 3199 Coral Way and Service and Parts Department at 3199 Coral Way Miami, Fla. Dealer shall neither, without the prior written consent of FDI, change the location of its Fiat salesroom, service department, or used car facilities, nor establish for use in its Fiat business pursuant to this Agreement, any additional salesroom, service department, or used car facilities.

SIXTH: This Agreement terminates and supersedes all prior written or oral agreements, if any, between FDI and Dealer, and between Dealer and any former distributor of Fiat passenger cars, parts and products, relating to the subject matter hereof, except with respect to any trade indebtedness which may be owing by either FDI or Dealer to the other, and except that this Agreement shall not operate to cancel any of Dealer's unfilled orders with FDI for any Fiat passenger cars, parts and products placed with FDI pursuant to the provisions of any sales agreement terminated or superseded by this Agreement. Except as herein otherwise provided, upon execution of this Agreement and in consideration of the execution thereof by FDI, Dealer releases FDI from any and all claims, demands, contracts, and liabilities (including statutory liabilities) of any kind and nature whatsoever, arising from or out of or in connection with any such prior agreements.

SEVENTH: This Agreement shall not become effective until signed at Montvale, New Jersey, by the President or two Vice Presidents of FDI. No representative of FDI shall have authority, other than by a writing signed as above, to waive any performance under or any of the provisions of this Agreement to

make any amendment or modification of, or any other change in, any printed portion of this Agreement, or to make any agreement which imposes obligations on either FDI or Dealer not specifically imposed by this Agreement, or which renews or extends this Agreement.

EIGHTH: This Agreement shall become effective as of the day and year first above written and shall continue in effect until December 31, 1975, when it shall terminate, unless otherwise previously terminated in accordance with the applicable provisions of this Agreement.

NINTH: Except as provided herein, FDI shall not be under any liability whatsoever for any expenditure made or incurred by Dealer in connection with Dealer's performance of its obligations pursuant to this Agreement.

TENTH: Contracts, agreements, promises, and representations on behalf of FDI relating to or granting distribution franchises or selling rights in respect to any of the FDI Products herein defined, and any ratification, modification, renewal, extension, or waiver thereof, are authorized by the Board of Directors of FDI, to be made only in writing signed by one of the persons referred to in Paragraph SEVENTH.

ELEVENTH: This Agreement is to be governed by, and construed according to, the laws of the State of New York. It is understood, however, that it is a general form of agreement designed for use in any state; and it is therefore agreed that any provision herein contained which in any way contravenes the laws of any state or constituted authority which may apply to this Agreement, shall be deemed to be deleted herefrom.

TWELFTH: Any notice to be given hereunder may be delivered to the party if a sole proprietor, to a partner of the party if a co-partnership, or to an officer of the party if a corporation, or may be given by sending such notice by registered mail or by telegram addressed, as to Dealer, to its principal office as above stated, and as to FDI, to its principal office as above stated, marked "Attention President or Vice President for Sales." Except as otherwise provided, any notice so given shall be considered to have been given when delivered or mailed as provided above.

IN WITNESS OF THE FOREGOING, this Agreement is signed hereunder in duplicate by the parties hereto as of the date first appearing.

CORAL GABLES IMPORTED MOTOR CARS, INC.
(Dealer's Firm Name)

BY /s/ C. M. Rebhan

TITLE Pres.

WITNESS /s/ [illegible] Couch

FIAT DISTRIBUTORS, INC.

BY /s/ D. E. Manning

TITLE _____
President or Vice President

By /s/ [illegible] Nelson
Vice President

Recommended by /s/ Wm. A. Bartlett
Zone Sales Manager

FIAT DISTRIBUTORS, INC.
DEALER OPERATING REQUIREMENTS AGREEMENT

Fiat Distributors, Inc., in its sincere desire to promote and improve the merchandising and service of Fiat passenger cars in the United States, through the cooperation of independently owned and operated Fiat dealerships, recognizes the need for sound business practices—ethical while competitive—if the long-range goals of Fiat Distributors, Inc. and its dealers are to be achieved. In this recognition, Fiat Distributors, Inc. has established standards of operation for dealership operations, in the knowledge that adherence to such standards will enhance the public image of Fiat vehicles and of the dealers who sell and service them and will help insure the mutual success of Fiat Distributors, Inc. and its dealers.

Dealer recognizes that public confidence is the priceless ingredient in any successful sales and service program, and agrees that such confidence is earned only by conducting its business in such a manner as to assure its customers of fair play, dependability and efficiency of service.

For these reasons, the undersigned Dealer agrees to operate and conduct its Fiat business in accordance with the Fiat Distributors, Inc. Dealer Sales and Service Agreement, the Fiat Distributors, Inc., Dealer Sales and Service Agreement Standard Provisions and, in particular, with the provisions individually prescribed in this Dealer Operating Requirements Agreement, and agrees to correct existing deficiencies, as shown in this Dealer Operating Requirements Agreement, in order that the minimum operating standards

recommended by Fiat Distributors, Inc., or its representatives might be achieved, provided however that it is understood and agreed that if the factors contributing to the establishment of the Dealer Operating Requirements set forth below shall materially change during the term of this Agreement, then the parties shall make such changes in these Dealer Operating Requirements as shall be reasonable.

I. GENERAL

It is agreed that Dealer will, through all its departments, safeguard and promote the reputation of Fiat products and avoid discourteous, deceptive, misleading or unethical practices, and will do everything in its power to establish good customer relations. In particular, Dealer will provide the following:

A. Net Working Capital will be maintained at not less than $110,000.

B. A wholesale finance commitment on a continuing basis will be provided and maintained.

Minimum Wholesale Credit exclusive for Fiat will be $200,000.

C. The following persons will participate actively in the daily operation and management of Dealer's Fiat business.

New Car Sales Manager Bob Foist

Used Car Sales Manager

Service Manager Gene Richmond

Parts Manager Howard McBain

D. Standard "Fiat" identification sign will be prominently displayed and maintained in good condition.

E. Dealership will maintain competitive working hours to assure customers, and owners as fine service as possible.

F. Dealer will advertise and promote Fiat passenger cars and service in a businesslike manner.

G. Office space, closing rooms and other public areas of dealership will be maintained in presentable condition.

II. SALES DEPARTMENT

Dealer recognizes that the successful operation of its dealership requires an attractive display area staffed by competent personnel adequately compensated and under effective supervision. Dealer therefore agrees that the following sales facilities will be provided:

A. Fiat passenger cars will be displayed in the showroom in a manner to make them accessible to the public and customers, and area shall be properly illuminated.

B. Dealership will employ at all times a minimum of 6 salesmen, who will be trained in accordance with Fiat Distributors, Inc. standards and be exclusively assigned to the sale of Fiat vehicles.

C. A Fiat Salesman's Compensation Plan will be provided as follows: 20% of retail gross plus bonus plans.

D. It is agreed that the Sales Objective for Fiat passenger cars will be 390 during 1975, subject to changes as aforesaid.

E. The minimum inventory of Fiat passenger cars in Dealer's stock during 1975 will be 65 units, consisting of a representative inventory of Fiat models, if sufficient cars are available from FDI.

F. The number of Fiat demonstrators in use will be 6 units. These will be maintained in top condition mechanically and in appearance.

III. USED CAR DEPARTMENT

Recognizing the importance to the success of the dealership of a well operated Used Car Department, Dealer agrees to provide the following Used Car Facilities:

A. It is agreed that no Fiat vehicle will be advertised or displayed "For Sale" at retail which has not been properly reconditioned.

B. Used car display area will be properly lighted. Used Fiat vehicles will be prominently displayed.

C. Fiat used car sales reports will be submitted in accordance with Fiat Distributors, Inc. recommendations.

D. Every effort will be put forth to enhance the value of Used Fiat passengers cars.

IV. SERVICE DEPARTMENT

Recognizing that the quality of the service offered Fiat customers will be reflected in the success of the dealership as a whole, Dealer agrees that it will offer its customers prompt, courteous, dependable service at fair prices. Dealer agrees that the following changes and/or improvements recommended by Fiat Distributors, Inc. in the course of an analysis of Dealer's Service Department.

V. PARTS DEPARTMENT

Recognizing that an efficient and properly stocked Parts Department is essential to the successful operation of Dealer's Service Department, and to the maintenance of customer good will, Dealer agrees to provide the following Parts Facilities:

A. Minimum number of personnel assigned to Fiat parts: 3

B. Parts Department will be adequately staffed.

C. Parts bins and storage space will be provided for Fiat parts in accordance with Fiat Distributors, Inc. surveys and recommendations from time to time.

D. Parts will be binned in such a manner as to maintain physical separation of Fiat parts from other make parts in inventory.

E. Fiat Parts inventory will be maintained at a 60-day supply.

F. Parts orders for stock will be made at monthly or bi-monthly intervals, and individual items will be reordered when inventory reaches a 30-day supply.

G. A perpetual inventory and accounting system will be maintained to enable the Parts Department to show separately, Fiat parts purchases, inventories, sales and gross profits.

H. It is agreed that dealership will price its parts to customers fairly and will be guided by retail prices suggested by Fiat Distributors, Inc.

I. It is agreed that dealership will sell parts to independent garages on a competitive basis and will be guided by the discounts as suggested by Fiat Distributors, Inc.

VI. DEFICIENCIES

It is agreed that all of the recommendations, changes and deficiencies outlined below will be completed within time indicated.

Will have 12 mechanics as required by July 15, 1975.

Will have working shop Foreman, 7/15/75

Fiat Distributors, Inc. makes available to Dealer not only the Fiat line of vehicles, but also the efforts of a team of specialists whose purpose is to assist Dealer

in achieving its goals of a successful and profitable dealership. Dealer, recognizing that its responsibility demands the most effective use of its available facilities, capital and personnel, agrees that the above statements constitute its commitments to Fiat Distributors, Inc. for meeting the Standards of Operation established for its market.

CORAL GABLES IMPORTED MOTOR CARS, INC.
(Dealer's Firm Name)

By /s/ C. M. Rebhan
(Signature of Authorized Person)

Title Pres.

Date Signed 5/14/75

Accepted: FIAT DISTRIBUTORS, INC.

By /s/ D.E. Manning

Title
President or Vice President

/s/ [Illegible] Nelson
Vice President

FIAT DISTRIBUTORS, INC.
DEALER SALES AND SERVICE AGREEMENT
STANDARD PROVISIONS

The following Standard Provisions have been made a part of and are incorporated by reference in the FDI Dealer Sales and Service Agreement and shall apply to and govern the transactions, dealings, and relations between FDI and Dealer, as therein identified:

1. Standards of Operation

In the conduct of its business, Dealer shall safeguard and promote the reputation of Fiat and FDI products, and of Fiat S.p.A. and FDI, and shall refrain from all conduct which might be harmful to such reputation or to the marketing of such products or inconsistent with the public interest, and shall avoid all discourteous, deceptive, misleading, or unethical practices.

2. Dealer Relationship

The relationship between FDI and Dealer, during the term of this Agreement, shall be that of vendor and vendee. Dealer is not the agent or legal representative of FDI or Fiat S.p.A. for any purpose whatsoever and is not granted, by the terms or execution of this Agreement or otherwise, any express or implied right or authority to assume or create any obligation or responsibility on behalf or in the name of FDI or Fiat S.p.A., in any manner or thing whatsoever.

3. Capital Requirements

Dealer recognizes that in order to conduct its business on a profitable basis and in order to fulfill properly its obligations under this Agreement, it is necessary for Dealer to maintain adequate cash, net working capital, and net worth—the amount thereof depending upon many factors, including among others, size of market, sales and service facilities required, and anticipated volume. Since FDI has set standards for cash, working capital, and net worth requirements of its dealers based on past experience, Dealer agrees to establish and maintain its cash, net working capital, and net worth in the amounts and forms which FDI deems necessary for the conduct of Dealer's business hereunder. If the amount of Dealer's cash, net working capital, or net worth is at any time inadequate, in FDI's estimation, for the proper conduct of Dealer's business, Dealer will take the necessary steps to meet FDI's applicable requirements within a reasonable period of time as specified by FDI.

4. Trade Name Trade-Marks Patents Signs

(a) Dealer may use the word "Fiat" or any other name, trade name, or trade-mark adopted or used by Fiat S.p.A., FDI, or by subsidiaries of either, in connection with and for the purpose of identification, advertising, sale and merchandising of Fiat or FDI Products; but shall not use the word "Fiat" or any other name, trade name, or trade-mark adopted or used by Fiat S.p.A., FDI, or their subsidiaries, or any coined word or combination containing any of such words in the name under which Dealer conducts its business, if a sole proprietorship or a co-partnership, or in the name of Dealer, if a corporation.

(b) RECOMMENDED AND APPROVED SIGNS. Dealer shall display such signs and other indicia indicating that Dealer's place or places of business are those of an authorized Dealer of Fiat or FDI Products at such place or places and in such manner as FDI recommends or approves, and not otherwise.

(c) DISCONTINUANCE OF USE ON TERMINATION. Except as hereinafter expressly provided, Dealer shall immediately upon expiration or termination of this Agreement cease to be an authorized Fiat dealer, and at Dealer's sole expense shall:

(i) Discontinue and thereafter refrain from the use and/or display, directly or indirectly, of any name, word, trade name or trade-mark, use of which is permitted under paragraphs 4(a) and 4(b) hereof, and of any stationery, printed matter, advertising or advertising cuts containing any name, word, trade name or trade-mark, use of which is permitted under paragraphs 4(a) and 4(b) hereof; and

(ii) Refrain from any use and/or display, directly or indirectly, of any name, word, trade name, trade-mark, coined word or combination thereof so nearly resembling any name, word, trade name or trade-mark used or claimed by Fiat S.p.A., FDI or subsidiaries of either, as would be likely to lead to confusion or uncertainty.

In the event that at the effective date of the expiration of termination of this Agreement, Dealer has any Fiat or FDI Products on hand, then Dealer may continue the uses permitted by paragraphs 4(a) and 4(b) so long as Dealer has any such unsold Products

on hand, but in no event for a period exceeding ninety (90) days after the effective date of the expiration or termination of this Agreement, provided, however, that Dealer may not continue so to do after any exercise of the option to repurchase pursuant to paragraph 56 hereof.

(d) CONTEST OF TRADE NAMES, PATENTS AND TRADE-MARKS. Dealer shall not:

(i) Contest the exclusive rights of Fiat S.p.A., FDI or any subsidiary of either, to any trade-mark or trade name at any time owned or claimed by Fiat S.p.A., FDI or any subsidiary of either;

(ii) Contest the validity of any patent owned or claimed by Fiat S.p.A., FDI or any subsidiary of either, and/or under which Fiat S.p.A., FDI or any subsidiary of either has or claims any right, title or interest; or

(iii) Unless otherwise directed by Fiat S.p.A., or FDI, remove, alter or cause to be removed or altered the patent numbers, trade-marks and/or trade names affixed to any Fiat or FDI Product, nor shall Dealer, unless otherwise directed by Fiat S.p.A. or FDI affix or cause to be affixed any patent number, trade-mark or trade name to any Fiat or FDI Product.

5. Advertising

Both FDI and Dealer recognize the need for maintaining the highest standards of ethical advertising consistent with the reputation and standing of FDI Products in order to maintain public confidence and respect in Dealer, FDI and FDI Products.

Accordingly, neither FDI nor Dealer will publish, nor cause or permit to be published, any advertising relating to FDI Products which is likely to mislead or deceive the public or to impair the good will of FDI or Dealer or the reputation of FDI Products.

6. Cooperative Advertising Fund

In order to give Dealer the advantages of a comprehensive and coordinated dealer advertising program, a cooperative advertising fund has been established which, for purposes of effectiveness and economy is under the control of, and is administered by, FDI for the benefit of all dealers.

7. Contributions and Handling of Fund

The Cooperative Advertising Fund, as set forth from time to time in FDI Sales Letters, will be accumulated in a separate advertising account for each individual dealer.

The funds in this Cooperative Advertising Account are available to Dealer on arrangements made with and approval granted by FDI, and are to be used only for the cost of new car advertising (including preparation expense for such advertising), scheduled in Dealer's local market, in addition to his normal, budgeted local advertising expenditures.

Such funds shall remain to the credit of Dealer, with any balance remaining at the end of the year being carried forward.

8. Cooperative Promotion Service

Dealer will benefit from the simultaneous use by all dealers in FDI Products of effective new model announcement literature, catalogs, banners and like materials from the economies attendant upon preparation and purchase by FDI of basic Sales Promotion Literature, Parts and Service Manuals and other materials, for all dealers. This service will include such new model announcement and other sales promotion materials, and parts and service materials, as are described from time to time in FDI Sales Letters. Dealer agrees to contribute to the cost of such cooperative sales promotion service such amount per Fiat passenger car purchased from FDI as FDI shall establish from time to time. Such amounts do not include the cost of special campaigns or special literature not described in such letters.

In calculating the distribution of the total cost of materials under this heading, it will be expected that Dealer's contribution will amount to approximately one-third (⅓) and FDI two-thirds (⅔).

9. Exhibitions, Etc.

Dealer shall participate, at its expense, in exhibitions, fairs and other similar events in keeping with the market sales potential and practices of Dealer's market area.

10. Sales Promotion and Performance

Dealer shall use its best efforts to promote the sale of Fiat passenger cars in its market area through regular contacts with owners and prospective owners

and through such means as may be suggested from time to time by FDI.

Dealer shall use its best efforts in order to achieve maximum sales performance in its market area for Fiat passenger cars. Such sales performance shall be evaluated on the basis of such reasonable criteria as may be determined from time to time to be pertinent, including, but not limited to:

(a) Fair and reasonable sales objectives which may be established from time to time by FDI for Dealer;

(b) The ratio of sales of Fiat passenger cars to other makes of passenger cars of comparable quality, price and specifications in the area;

(c) The development of Dealer's sales performance over a reasonable period of time; and

(d) Particular conditions in the area, if any, directly affecting sales performance and potential sales performance.

Where in addition to Dealer other Fiat dealers operate within the area, as in a metropolitan area, the combined sales performance of all Fiat dealers in the area shall be evaluated as indicated in the preceeding sentence, and Dealer's sales performance shall be evaluated on the basis of that proportion of the sales and potential sales of Fiat passenger cars in the area for which Dealer fairly may be held responsible according to such reasonable criteria as FDI may determine from time to time, including, but not limited to, the location of Dealer's salesroom, the general shopping habits of

the public within the area, the history of Dealer's sales participation within the area, and standards for Dealer's sales participation within the area as previously determined by FDI and accepted by Dealer.

11. Dealer's Stocks

Dealer shall purchase and maintain on hand at all times for display and demonstration purposes an adequate stock of Fiat passenger cars to meet the requirements for Dealer's territory, and Dealer shall maintain an adequate number and assortment of parts and accessories.

12. Demonstrators

Dealer shall also have available at all times for purposes of demonstration Fiat passenger cars of the most current models and shall keep the same at all times in first class operating condition.

13. Handling of Dealer Orders

(a) In order to facilitate the orderly scheduling of importation, assembly or production, and deliveries, Dealer shall submit each month to FDI, on forms approved by FDI, estimates of Fiat passenger cars required by him during the next ninety (90) days.

(b) FDI shall give careful consideration to each order received from Dealer for Fiat passenger cars and other FDI Products. Shipments of such products will be made via routes specified by Dealer wherever possible, but FDI shall not be liable where means of transportation are found necessary that do not conform with Dealer's request.

(c) FDI, however, will not ship any FDI Products to Dealer, except pursuant to Dealer's specific order.

14. Delays in Delivery

FDI shall not be under any liability to Dealer for failure to deliver or for delay in making delivery pursuant to orders of Dealer accepted by FDI, if such failure or delay is due to the fact that delivery or timely delivery was rendered impossible or more burdensome than it would have been in the normal course of business by any event, whether forseen or foreseeable or not, brought about by causes other than willful or grossly negligent conduct of FDI, such as for instance, any event in the nature of force majeure, acts of God, acts of any government, foreign or civil wars, riots, interruptions of navigation, shipwrecks, strikes, lockouts, other labor troubles, embargoes, blockades, fires, explosions, failures of Fiat S.p.A. or any other supplier of FDI in making delivery—the foregoing specific events being listed herein only by way of illustration and not by way of limitation.

15. Price

The Dealer Price of each FDI Product shall be determined and sent to Dealer by FDI. FDI may find it necessary to revise Dealer Prices from time to time, and shall notify Dealer of any such revision. Revisions in Dealer Prices shall be effective on the date specified by FDI.

16. Lines of Credit

Dealer shall maintain, during the term of this Agreement, a line or lines of credit with a financing institution or institutions satisfactory to FDI in a total minimum amount sufficient to purchase or to finance the purchase by Dealer of Fiat passenger cars required by Dealer for a period of ninety (90) days, as determined by the normal expectancy of Dealer's market area.

17. Payment For Vehicles

Payment for each Fiat passenger car purchased by Dealer shall be made in cash at the time of delivery unless the invoice provides otherwise, in which event the terms of the invoice shall govern. Receipt of any letter of credit, check, draft, or other commercial paper in connection with the sale of any such vehicle shall not constitute payment therefor until FDI has received cash in the full amount payable under such instrument. Dealer shall pay all collection charges.

18. Passing of Title

Title to Fiat passenger cars shall pass to Dealer upon receipt by FDI of full payment therefor.

19. Failure to Accept Delivery

In the event that Dealer should fail or refuse, for any reason whatsoever, to accept delivery of any Fiat passenger car ordered by Dealer, Dealer shall pay FDI the amount of all expenses incurred by FDI in shipping such Fiat passenger car to Dealer and in returning it to the original point of delivery or in directing it to another

destination. The liabilities of Dealer pursuant to this paragraph shall be in addition to, and not in lieu of, such other liabilities as may arise from Dealer's failure or refusal to accept delivery.

20. Demurrage and Diversions

Dealer shall be responsible for and shall pay any and all charges for demurrage, storage and other charges accruing after arrival of any shipment at its delivery point specified by Dealer. If diversions of shipments are made upon Dealer's request, Dealer agrees to pay the additional charges and expenses incident to such diversions, but in no event shall Dealer pay FDI an amount in excess of the charges of expenses incident to returning shipments to their original shipping points.

21. Price Increases

Whenever FDI shall increase the Dealer Price for any model of Fiat passenger car, Dealer shall have the right, with respect to any Fiat passenger car to which such increase is applicable, to cancel outstanding orders, by notice to FDI within ten (10) days after receipt by Dealer of notice of such increase, provided, however, that such right to cancel shall apply only to Fiat passenger cars undelivered by FDI at the time of receipt by FDI of such cancellation notice. Failure to so cancel within the time specified will constitute a confirmation of all undelivered orders in accordance with such price increase.

22. Price Reductions

In the event FDI at any time shall reduce the Dealer Price by the sum of Five Dollars ($5.00) or more

for any model of Fiat passenger car being offered for sale by FDI as a current model on the effective date of such reduction, FDI shall provide a refund or credit to Dealer as follows. For each new, unused, undamaged, and unsold Fiat passenger car (and for each unsold new car demonstrator which was duly registered with FDI when assigned to such use) of such current model in Dealer's stock on the effective date of such reduction, FDI will refund or credit to Dealer an amount equal to the amount by which the cost to Dealer exceeds the new Dealer price established by FDI for such Fiat passenger car.

23. Refunds and Credits

FDI shall make refunds and credits provided for in Paragraph 22 only if Dealer shall submit written application therefor, supported by evidence on a form or forms furnished by FDI, within thirty (30) days from the date Dealer becomes eligible to receive such refund or credit.

FDI reserves the right to pay any refund on any Fiat passenger car for which application for refund or credit is made by Dealer, to any financing institution which financed the purchase from FDI of such Fiat passenger car and which retains a lien thereon or an ownership interest therein.

24. Refund Limitations

FDI shall have no obligation to make refund or credit under Paragraph 22 with respect to:

(a) Any Fiat passenger car which has been used as a demonstrator and was not promptly registered with FDI by Dealer when assigned to demonstrator use;

(b) Any reduction in the amount of FDI charges for distribution and delivery or taxes;

(c) Any reduction in the amount of any contribution or any other sum for advertising or sales promotion;

(d) Any reduction in the suggested retail list price or dealer list price made by FDI or any lower retail list price or dealer list price established by FDI by reason of any law, order, or regulation of any government or any governmental agency;

(e) Any new and unused Fiat passenger cars which FDI deems unsalable as new cars by reason of damage caused by fire, flood, accident, or otherwise; or

(f) Any Fiat passenger cars of prior manufacture for which a special allowance has been previously made by FDI.

25. Cost to Dealer

The phrase "cost to Dealer", as used in Paragraph 22 above, shall be deemed to mean the dealer list price at which Dealer purchased the Fiat pasenger car from FDI, less all refunds, credits, rebates, allowances, and discounts made by FDI to Dealer with respect to such Fiat passenger car.

26. Changes in Design or Specifications

FDI and Fiat S.p.A. reserve the right, at any time, to make changes in the design or specifications of Fiat passenger cars and Fiat parts without notice to Dealer and without obligation to make such changes or substitutions or additions with respect to Fiat passenger cars and Fiat parts previously delivered to Dealer or being imported, manufactured, or sold in accordance with Dealer's orders, and, unless otherwise provided for herein, without any obligation to Dealer to make any refund upon any Fiat passenger cars or Fiat parts previously purchased by Dealer, whether or not the price of FDI Products previously sold by FDI is affected thereby.

27. Passing of Risks

Any Fiat passenger car sold to Dealer shall be at Dealer's risk from the time of its delivery to Dealer, Dealer's agent or a common carrier at the place of delivery specified in FDI's established terms of delivery and during all subsequent transportation; and it shall be the obligation of Dealer to insure, at its own expense, such risks for its benefit, and for the benefit of FDI when payment has not been made in full.

28. Extent of FDI's Responsibility For Damage

FDI assumes responsibility for the condition of Fiat passenger cars to the extent of damage caused by any event occurring after manufacture and prior to delivery of any Fiat passenger car to Dealer, Dealer's agent, or a common carrier at the place of delivery specified in FDI's established terms of delivery.

29. Claims

All claims that Fiat passenger cars have been delivered with parts missing must be made in writing to FDI within five (5) days after receipt of the shipment with respect to which such claims are made in accordance with the applicable provisions of FDI's "Warranty Procedure Manual".

30. Property Liability

FDI shall not be liable for damage by fire or other cause to property belonging to Dealer or to Dealer's customers, while such property shall be on premises of, or in possession of, FDI.

31. Representations in Sale of Fiat Passenger Cars

Dealer shall neither sell as a new Fiat passenger car any Fiat passenger car which is not in fact new and unused, nor misrepresent a model year or year of manufacture of any Fiat passenger car; and Dealer shall sell all Fiat passenger cars in accordance with such directives as FDI shall issue, from time to time, for the designation of model and age classifications of Fiat passenger cars.

32. Compliance With Laws

Dealer shall comply with all laws of the local, state, and federal governments respecting licensing, registration, and model year requirements.

33. Local Taxes

With each order furnished by Dealer to FDI, Dealer represents and warrants, as of the date of the purchase of the Fiat passenger cars ordered, that all Fiat passenger cars purchased from FDI are purchased by Dealer for resale in the ordinary course of Dealer's business. Dealer shall pay any and all sales taxes, use taxes, excise taxes, and other governmental or municipal charges imposed or levied or based upon the sale of Fiat passenger cars by FDI to Dealer, except federal excise taxes which may be included in the price of FDI to Dealer.

34. Customer Deposits

Dealer shall hold in trust each deposit of money and/or property received from a customer in anticipation of a future delivery of a Fiat passenger car to such customer until such delivery is consummated; and until such delivery is consummated, Dealer shall: (a) keep any such money in a separately designated trust fund not commingled with Dealer's own funds, and (b) hold title to any such property in trust, and not place or permit the placing of any lien on such property, or sell the same without at the time placing in such a trust fund a sum in cash equal to the amount of the allowance granted to the customer by Dealer with respect thereto. Dealer shall enter into an agreement with each prospective customer at the time such deposit or transfer is made, binding Dealer with respect to such money or property as provided above.

35. Customer Service

Dealer shall provide the best possible customer service for all owners of Fiat passenger cars, performing

all work in a good and workmanlike manner, and shall use its best efforts to promote its customer service in the area at reasonable prices charged to Fiat owners. Dealer will receive, investigate and handle all complaints received from Fiat owners with a view of securing and maintaining the good will of the public toward Dealer, Fiat and FDI products, and Fiat S.p.A. and FDI. All complaints received by Dealer which cannot be readily remedied shall be promptly reported in detail to FDI. Service facilities, including buildings and appearance, layout and amount of service space, and special Fiat tools and equipment, shall be recommended by FDI and will be in keeping with the sales potential and market area involved, and Dealer shall comply with such reasonable recommendations of FDI as they may be modified from time to time. Dealer agrees to make its technical personnel available to attend such FDI technical training classes as will be conducted on a regular basis at FDI's Regional Training Centers, and/or such FDI technical training classes as may be conducted from time to time at other convenient locations within the FDI Region in which dealer is located.

36. Genuine Fiat Parts, Accessories and Equipment

Dealer shall not sell, offer for sale or recommend for sale or use, or allow to be sold, offered for sale or recommended for sale or use, as genuine new Fiat Products or FDI Products any products which are not in fact genuine new Fiat Products or FDI Products manufactured by or for Fiat S.p.A. or FDI.

37. Customer Warranty

Each Fiat passenger car and each Fiat part installed or supplied by Fiat S.p.A. will be warranted by FDI to

Dealer only in accordance with FDI's "Warranty Procedure Manual" or any other warranty regulation in effect on the day of retail delivery of the respective product. The procedure for the processing and disposition of warranty claims and for the return and disposition of Fiat parts claimed to be defective shall be established from time to time by directives of FDI. Dealer shall comply with all requests of FDI for the performance of services pursuant to warranty claims.

38. Fiat Customer Warranty In Dealer's Sales

Dealer, acting on Dealer's behalf only, shall furnish the customer a warranty similar to the warranty made by FDI in connection with each sale by Dealer of a Fiat passenger car or Fiat parts. Dealer shall perform and fulfill promptly all the terms and conditions of each such warranty.

39. Owner's Service Policy

Dealer, acting on Dealer's behalf only, shall execute and deliver to each retail purchaser of a Fiat passenger car from Dealer an "Owner's Warranty and Service Book" on a form furnished by FDI, shall perform the required pre-delivery inspection and shall obtain and transmit to FDI the signed Acceptance and Pre-Delivery Certificate. Dealer shall perform and fulfill promptly all of the terms and provisions of each "Owner's Warranty and Service Book" executed and delivered by Dealer, or by another authorized Fiat dealer, in accordance with the provisions of the "Warranty Procedure Manual."

40. Parts Inventory

Dealer shall acquire and at all times maintain a minimum inventory of Fiat parts necessary to satisfy at any given time the requirements of Dealer's business for a period of ninety (90) days, in such assortment as FDI reasonably may require from time to time by notice in writing to Dealer.

41. Fiat Parts Prices

FDI shall sell Fiat parts and accessories to Dealer, and Dealer shall buy the same from FDI, at such prices and upon such terms as may be established from time to time by FDI. Dealer shall pay any and all sales taxes, use taxes, excise taxes, and other governmental or municipal charges imposed or levied or based upon the sale of Fiat parts by FDI to Dealer, except federal excise taxes which may be included in the price of FDI to Dealer.

42. Payment For Parts

Dealer orders for Fiat parts and accessories will be filled on the basis of payment terms established by FDI for Dealer's account from time to time. Such terms may provide for open account, limited open account, C.O.D., or cash. Collection charges, if any, on C.O.D. are to be paid by Dealer. In the event open account terms apply, Dealer will be billed net cash payable the fifteenth (15th) day of the month following the date of billing. Dealer will pay the total amount of such monthly billings without deductions for any reason.

43. Parts Delivery

Delivery of Fiat parts and accessories ordered by Dealer shall be made by delivery to Dealer or to a carrier or United States Mail for shipment to dealer.

44. Right to Return Parts Within Sixty Days

Dealer may, pursuant to written notice given to FDI within sixty (60) days after receipt thereof, return any new Fiat parts purchased hereunder for credit. No such parts shall be returned, however, until the Dealer shall have furnished FDI with a list of the Fiat parts to be returned, upon receipt of which FDI will advise Dealer as to shipping instructions. Such Fiat parts shall be returned, transportation charges prepaid, to the destination specified by, and in accordance with, such instructions from FDI. At no time, however, are transportation charges paid by Dealer to exceed the transportation cost from Dealer's regular supplying warehouse.

45. Defective Parts Return

Dealer may, upon application and specific authorization from FDI, return defective Fiat parts to FDI for credit at the Dealer price therefor in effect at the date such Fiat parts are recieved by FDI, such parts to be shipped, transportation charges prepaid, to the destination specified by FDI. Dealer will be reimbursed for transportation charges prepaid by it on authorized shipments of defective Fiat parts.

46. Obsolescent Parts Return

Dealer may return to FDI during each calendar year parts and accessories of a value (at the Dealer price currently in effect) not exceeding 4% of the net dollar value of all the parts and accessories purchased by Dealer from FDI during such year, in exchange for new parts and accessories having a net dollar value eq to that of those returned. No such parts or accessories shall be returned, however, until Dealer shall have furnished FDI with a list of the parts or accessories to be returned, upon receipt of which FDI will advise Dealer as to shipping instructions. Such parts and accessories shall be returned, transportation charges prepaid, to the destination specified by and in accordance with such instructions from FDI. At no time, however, are the transportation charges paid by Dealer to exceed the transportation cost from Dealer's regular supplying warehouse.

47. Modifications

FDI may request Dealer to make modifications or refrain from making modifications of Fiat passenger cars, as may be prescribed from time to time by Fiat S.p.A. and FDI, including, but not limited to, modifications required in order to implement any action undertaken by Fiat S.p.A. or FDI pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, as amended, the Clean Air Act, as amended, or any other legislation or regulation pertaining to vehicle safety or air pollution, and Dealer shall promptly comply with such requests. FDI shall assume the cost of any Fiat parts and, at the rates as FDI may approve from time to time, of any labor which may be used by Dealer in making

modifications of Fiat passenger cars requested by FDI pursuant to this paragraph.

48. Dealer's Accounting

Dealer shall keep accurate and current books of account in accordance with the FDI uniform accounting system and with accounting practices reasonably satisfactory to FDI and enabling FDI to develop comparative data in order, among other things, to furnish to dealer, for dealer's benefit, business management assistance.

(a) Dealer shall mail or deliver to FDI on or before the tenth day of each calendar month on such forms as FDI reasonably may require, a financial and operating statement, reflecting separately dealer's operations for the preceding month and dealer's operations from the beginning of the calendar year to the end of the preceding month.

(b) Within three (3) months after the close of a dealer's fiscal or calendar year, dealer shall deliver to FDI a financial and operating statement for such year which shall be certified by a certified public accountant, unless FDI shall, by notice in writing to dealer, specifically waive the requirement of certification.

49. Sales Reports

Dealer shall furnish to FDI, on such forms and at such times as FDI reasonably may require, complete and accurate reports of Dealer's sales and stocks of new Fiat passenger cars, used Fiat passenger cars, Fiat parts, and of other used automobiles.

50. Inspection of Premises and Records

Until the expiration or prior termination of this Agreement and thereafter until consummation of all the transactions referred to herein, FDI, through its employees and other designees, shall have the right, at all reasonable times during regular business hours, to inspect Dealer's records and accounts.

51. Termination by Dealer

Dealer may terminate this Agreement at any time by written notice of termination delivered to FDI. Such notice of termination shall be delivered not less than thirty (30) days prior to the effective date of termination.

52. Termination By Notice Effective Immediately

Anything herein to the contrary notwithstanding,

(a) notice of termination of this Agreement or any renewal thereof, effective immediately, may be given by either party in any of the following events: (i) death of Dealer if Dealer is an individual or of any partner if Dealer is a partnership; (ii) insolvency or bankruptcy of Dealer, appointment by a court of a receiver, trustee or custodian for Dealer or Dealer's business, or an assignment by Dealer for benefit of creditors; (iii) failure of either party to obtain any license required to enable such party to carry out its obligations under this Agreement, or the revocation of suspension of any such license; and

(b) notice of termination of this Agreement or any renewal thereof, effective immediately, may be

given by FDI in any of the following events: (i) the failure or refusal on Dealer's part to fulfill or perform any one or more of his duties, obligations and responsibilities to be performed under this Agreement, provided that FDI shall have notified Dealer of such failure or refusal at least sixty (60) days prior to the giving of such written notice of termination and Dealer shall not have either remedied or ceased such failure or refusal or taken action satisfactory to FDI to prevent the recurrence in the future of such failure or refusal, Dealer hereby acknowledging and agreeing that each of such duties, obligations and responsibilities is reasonable and proper and that failure or refusal to perform any of them would constitute a material breach of the Agreement; (ii) dissolution of Dealer if Dealer is a corporation or co-partnership; (iii) any assignment or attempted assignment by Dealer of this Agreement without FDI's written consent; (iv) any change in the ownership of or financial interest in Dealer affecting control or active management thereof without the prior written consent of FDI; (v) failure of Dealer for any reason to function in the ordinary course of business, or failure for any reason to keep Dealer's place of business open during the hours customary in the trade; (vi) a disagreement between or among any principals, partners, managers, officers or stockholders of Dealer which in the opinion of FDI may affect adversely the ownership, operation, management, business or interest of Dealer or FDI; (vii) the death of any of the persons referred to in Article Fourth of the Dealer Sales and Service Agreement; (viii) conviction in a court of competent jurisdiction of Dealer, or a partner, manager, principal, officer or major stockholder, for any violation of law tending in FDI's opinion to affect adversely the operation or business of Dealer or the good name, good will or

reputation of Fiat S.p.A., FDI, FDI or Fiat Products, or Dealer; or (ix) submission by Dealer to FDI of false or fradulent statements or reports, including, without limitation, claims for refund, credit, reimbursement or other payment by FDI. Dealer shall advise FDI or cause FDI to be advised immediately in writing of the happening of any of the above specified events.

53. Expiration or Termination of Distributor Sales Agreement

Anything herein to the contrary notwithstanding, this Agreement and any renewals thereof shall expire and terminate immediately in the event of the expiration of termination of the Fiat Sales Agreement between Fiat S.p.A. and FDI or in the event that FDI shall cease to be an authorized Distributor of Fiat Products pursuant to written contract between FDI and Fiat S.p.A.

54. Cancellation of Orders on Termination

In the event of expiration or termination of this Agreement in accordance with Paragraphs 51, 52 or 53 hereof, all or any portions of Dealer's orders theretofore received and not as yet filled by FDI shall be automatically cancelled and FDI shall be relieved of any liability in connection therewith. Upon expiration or termination of this Agreement, Dealer shall promptly pay to FDI any and all sums owed by it to FDI. Notwithstanding the foregoing, the acceptance of orders from Dealer or the continuance of sale of Fiat passenger cars and/or Fiat or FDI parts and accessories or any other products to Dealer, or any other act of FDI after termination of this Agreement shall not be construed as a renewal of this Agreement for any further term nor as a waiver of the termination.

55. Survival of FDI Warranty

Anything herein to the contrary notwithstanding, Paragraphs 37 and 38 shall survive and, in accordance with their respective terms continue in full force and effect, despite any expiration or termination of this Agreement brought about pursuant to the provisions outlined.

56. Repurchase Option

If this Agreement expires and is not renewed or terminates for any reason whatsoever, FDI shall have the option, to be exercised by written notice given within thirty (30) days after the effective date of expiration or termination, to repurchase and reacquire from Dealer any or all Fiat and FDI Products in Dealer's stock and unsold by Dealer to a bona fide purchaser on the day when Dealer shall have received such written notice, including Fiat and FDI Products sold to or in the possession of any person, firm or corporation, directly or indirectly owned or controlled by Dealer or affiliated with Dealer by reason of direct or indirect common ownership or control. The price for any Fiat passenger car shall be the Dealer price at which such vehicle was purchased from FDI plus FDI's charge or charges for distribution and delivery and taxes paid by Dealer at the time of such purchase and less all prior refunds, credits, rebates, allowances, or discounts made by FDI with respect to such vehicle. If any Fiat passenger car is used or damaged or is not in first class salable condition or is of a type and model not being offered for sale by FDI on such date as a current type and model, then the price for such vehicle shall be a reasonable amount less than that prescribed above, to be mutually determined.

The price for any such Fiat or FDI Product other than a Fiat passenger car shall be the last Dealer Price for such Product invoiced to Dealer by FDI, less a fifteen percent (15%) handling charge and less any cash discount at the rate in effect at such time.

Delivery of all Fiat passenger cars reacquired by FDI pursuant to the provisions of this paragraph shall be made by a recognized common carrier to designated port of entry from which dealer normally receives Fiat automobiles. Arrangements with carrier shall be made by dealer and transportation expense shall be dealer's responsibility. Delivery of all Fiat or FDI Products other than Fiat passenger cars reacquired by FDI pursuant to the provisions of this paragraph shall be made by dealer to the Parts Depot servicing dealer. Dealer shall pack and box all such Fiat or FDI Products carefully, and shipping of such items shall be based on instructions from FDI Parts Depot and transportation shall be at Dealer's expense. In the event Dealer fails so to pack and box such Products, FDI may do so and deduct the expense thereof from the price of such Products repurchased.

57. Rights of Surviving Persons Named in Article Fourth

Notwithstanding the right of FDI forthwith to bring about the prior termination of this Agreement for cause, pursuant to Paragraph 52(b) (vii), upon the death of any of the persons referred to in Article Fourth of the Dealer Sales and Service Agreement, FDI shall not so terminate this Agreement prior to the termination date if:

(a) The surviving persons participating in the active management and ownership of Dealer, as stated in Article Fourth of the Dealer Sales and Service Agreement, remain unchanged and can, in the opinion of FDI, comply with the requirements imposed upon Dealer by this Agreement; or

(b) Within sixty (60) days after the death of such person, arrangements are completed for the assumption of active management and/or ownership of Dealer during the remainder of the term of this Agreement by persons acknowledged by FDI to be satisfactory to it.

58. Widow's Financial Participation

In the event of the death of any of the persons referred to in Article Fourth of the Dealer Sales and Service Agreement and in the event such person, at the time of his death, is possessed of a beneficial interest in the dealership which, by reason of his death, passes directly to his widow and/or children, and if the surviving persons participating in the active management and ownership of Dealer, as stated in said Article Fourth, can, in the opinion of FDI, comply with the requirements imposed upon Dealer by this Agreement, FDI will consent to the retention by such widow and/or children of a financial interest in the dealership, subject, however, to the rights, if any, of the surviving person or persons to buy out the widow's and/or children's interest in accordance with any agreement made by them.

59. Notice of Failure to Act in "Good Faith"

In the interest of maintaining a harmonious relationship between FDI and Dealer, Dealer shall report

promptly, in writing, to the President of FDI any act or failure to act on the part of FDI which Dealer deems not to have been, or that Dealer proposes to use in support of a claim that FDI has not acted, in good faith as to Dealer. For the purpose of this paragraph, the term "good faith" shall mean FDI and its representatives acting in a fair, equitable, and impartial manner toward Dealer so as to guarantee Dealer freedom from coercion or intimidation or threats of coercion or intimidation from FDI as those words are employed in the context of the Automobile Dealers Franchise Act, 15 U.S.C.A. §1221, et seq. It is the intention of the parties that the purpose of the requirement of such notification by Dealer is to afford FDI sufficient opportunity to consider the claim of Dealer and if, in the sole determination of FDI, such claim is found to be meritorious, to undertake such measures which may be necessary to correct the condition complained of to the end that FDI shall, at all times, act in good faith as to Dealer.

60. Indemnity

Dealer agrees to indemnify FDI against all actions, claims, damages, expenses and attorney fees incurred by FDI by reason of any act of Dealer, or arising out of any breach of this Agreement by Dealer, or arising out of any action to which FDI is made party through Dealer.

61. General

(a) **Authority to Sign for FDI.** Dealer acknowledges that only the President, or two Vice Presidents, of FDI are authorized, on behalf of FDI, to execute this Agreement or any modifications or amendments thereto

or any notice of prior termination thereof. Contracts, agreements, promises, representations, understandings, or arrangements of any nature, with respect to this Agreement, which shall purport to have the effect of waiving performance of any of the provisions of this Agreement, or making any amendment or modification or any other change in, or addition to, this Agreement, or imposing definite obligations on either FDI or Dealer not otherwise specifically imposed by this Agreement, or of terminating, renewing, or extending this Agreement shall have the effect only if made in writing and signed by the President, or two Vice Presidents.

(b) **No Implied Waivers.** Except as otherwise provided for in this Agreement, the failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the full right to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision hereof constitute a waiver of any succeeding breach of the same or any other such provision, nor constitute a waiver of the provision itself.

(c) **Separability.** In the event any provision of this Agreement shall be determined to be invalid or unenforceable or prohibited by the laws of the State or place where it is to be performed, this Agreement shall be considered divisible as to such provision, and such provision shall be inoperative and shall not be part of the consideration moving from either party to the other, and the remaining provisions of this Agreement shall be valid and binding and of like effect as though such provision were not included herein.

(d) **Representations.** FDI and Dealer both acknowledge that no representation or statement, other than those expressely set forth herein, has been made by or on behalf of the other, or relied upon in entering into this Agreement that in any way tends to change or modify the terms or any of them of this Agreement, or that in any manner prevents this Agreement from becoming effective; and further acknowledge that there is no other agreement or understanding, either oral or in writing between the parties affecting this Agreement or relating to the subject matter hereof.

(e) **Waiver of Jury.** FDI and Dealer both acknowledge and agree that any controversy which may arise under this Agreement or the relationship established thereby would be based upon difficult and complicated issues, and therefore the parties agree that any lawsuit growing out of any such controversy will be tried in a court of competent jurisdiction by a judge sitting without a jury.

(f) **No Transfer.** This Agreement, or any part thereof or interest therein, may not be transferred or assigned by the Dealer without the prior written consent of FDI.

(g) **Notices.** Any notice hereunder shall be given or directed to the respective addresses of the parties in accordance with Article Twelfth of the basic Dealer Sales and Service Agreement, or to such other address of a party as it may have specified by notice in writing to the other party. Each party shall promptly advise the other, in writing, of any change of address.

(h) **Entire Agreement.** The basic Dealer Sales and Service Agreement and these Standard Provisions (plus the Dealer Operating Requirements Agreement and FDI's "Warranty Procedure Manual" as they may be revised from time to time) contain the entire Agreement between the parties.

Accepted: FIAT DISTRIBUTORS, INC.

By D. E. Manning

Title _____
President or Vice President

/s/ [illegible]
Vice President

APPENDIX G

FIAT

DEALER
SALES and SERVICE
AGREEMENT

FIAT DISTRIBUTORS, INC.

FIAT DISTRIBUTORS, INC.

DEALER SALES AND SERVICE AGREEMENT

AGREEMENT, effective as of the 14th day of January, 1976 by and between Fiat Distributors, Inc., a New York corporation, with headquarters at 155 Chestnut Ridge Road, Montvale, New Jersey, hereinafter referred to as "FDI", and

CORAL GABLES IMPORTED MOTORCARS, INC.

a FLORIDA

corporation ☑ co partnership ☐

individual ☐ limited partnership ☐

doing business as _____

Name

of 3199 CORAL WAY MIAMI

Number and Street City

County DADE State FLORIDA Zip 33135

hereinafter referred to as "DEALER".

BASIS OF AGREEMENT

FDI has the right in the United States (including Hawaii and Alaska) to distribute, use, sell and service Fiat motor vehicles and components, parts and accessories therefor. These motor vehicles and parts and accessories therefor are sold to the public and serviced primarily by authorized dealers. FDI and Dealer recognize that Fiat motor vehicles over a period of years have earned the good will of the motoring public. FDI and Dealer further recognize that the success of the distribution and sale of such motor vehicles is dependent upon the continuation of this good will and that, in order to

maintain and further this goodwill, FDI must distribute only quality Fiat motor vehicles to quality dealers, and Dealer must sell and service such vehicles under fair policies and courteous practices.

In order that the public, FDI and each of its dealers obtain the maximum benefit from the method established by FDI for the sale of Fiat motor vehicles, it is necessary that dealers be selected who enjoy good reputations in their respective market areas and possess facilities and personnel in keeping with the sales potential in such areas. It is expected that each Fiat dealer will adopt and follow sound business practices in order to fully develop the market for Fiat motor vehicles in his sales area.

FDI will provide extensive sales and merchandising programs designed to assist dealers in merchandising and servicing of motor vehicles, parts, accessories and equipment. Experienced sales, service and parts specialists of FDI are available to assist Dealer and to provide counsel and advice toward the conduct of his dealership on a successful basis.

This Agreement is intended to set forth in a clear and understandable manner the terms and conditions under which Dealer and FDI agree to do business together and to set forth the responsibilities of each to the other and to the public. By fully assuming such responsibilities and through cooperative effort, each will benefit from public goodwill and the resultant business success.

IN CONSIDERATION of the foregoing and the mutual agreements herein contained, the parties hereto agree as follows:

FIRST: As used in this Agreement, the following terms shall have the following meanings:

(1) **This Agreement** shall include this Fiat Dealer Sales and Service Agreement and the accompanying Standard Provisions, Fiat Dealer Operating Requirements Agreement, and the FDI "Warranty Procedure Manual".

(2) **Fiat S.p.A.** is the manufacturer of Fiat Vehicles; it is a limited company organized and existing under and by virtue of the laws of the Republic of Italy.

(3) **Fiat passenger car or vehicle** shall mean any new passenger car bearing the trademark or trade name Fiat and which has been certified by Fiat S.p.A. to conform with all applicable Federal motor vehicle safety and emission control standards.

(4) **Fiat parts and accessories** shall mean new parts, components and accessories manufactured for or by FDI, designed primarily for use on Fiat passenger cars and distributed by any subsidiary or Parts Depot of FDI.

(5) **FDI Products or Fiat Products** shall mean new Fiat passenger cars, parts and accessories therefor, and tools and equipment therefor, and other products whether or not manufactured or supplied by Fiat S.p.A. which from time to time may be offered by FDI to Dealer for resale under this Agreement.

(6) **Dealer Price** shall mean, with respect to each Fiat Product or FDI Product to which it refers, the price to Dealer for such Product as from time to time is established by FDI.

SECOND: Subject to and in accordance with the terms and conditions hereof, FDI will sell to Dealer and Dealer will buy from FDI, Fiat passenger cars, parts and accessories, and other FDI Products, on a non-exclusive basis, and Dealer will have primary responsibility for the promotion and development of the sale of such products in the following area

CITY OF MIAMI

COUNTY OR PARISH OF DADE

STATE OF FLORIDA

provided however, that in any area which has been designated by FDI as a multiple point franchise market, FDI will not enter into a Fiat Dealer Sales And Service Agreement with another dealer approving a salesroom within a radius of three miles of normal direct driving distance from Dealer's approved salesroom specified in Article Fifth hereof, and in other areas within five miles thereof, unless such other dealer has been operating under a Fiat Dealer Sales and Service Agreement prior to date of this Agreement, within whichever radius is applicable.

This area has been designated by FDI as a Multiple Point Franchise Market.

Yes ✓ No _____

The area described above cannot be altered except by written notice to or written agreement with Dealer.

THIRD: The accompanying Dealer Sales and Service Agreement Standard Provisions, Fiat Dealer

Operating Requirements Agreement and FDI "Fiat Warranty Procedure Manual" which have been read and agreed to by both Dealer and FDI are hereby made a part hereof and are incorporated herein with the same force and effect as if set forth herein in full.

FOURTH: This Agreement has been entered into by FDI with Dealer in reliance upon and in consideration of the personal qualifications and representations with respect thereto of the following named persons who actively and substantially participate in the ownership and/or active management of Dealer.

Name	Address	Percentage of Ownership	Title
Charles Rebhan	Miami, Fla.	100%	Pres.
Douglas Rebhan	Miami, Fla.	-0-	V. Pres.

Except as may be otherwise provided in this Agreement, neither Dealer nor the persons named above shall permit any change in the ownership or active management of Dealer without the prior written approval of FDI.

FIFTH: FDI hereby approves the following locations for Dealer's business pursuant to this Agreement: a salesroom at 3199 Coral Way, facilities for the sale of used cars with space provided for used Fiat passenger cars at 3199 Coral Way and service and parts department at 3199 Coral Way Miami, Fla. Dealer shall neither, without the prior written consent of FDI, change the location of its Fiat salesroom, service department, or used car facilities, nor establish for use in its Fiat business pursuant to this Agreement, any additional salesroom, service department, or used car facilities.

SIXTH: This Agreement terminates and supersedes all prior written or oral agreements, if any, between FDI and Dealer, and between Dealer and any former distributor of Fiat passenger cars, parts and products, relating to the subject matter hereof, except with respect to any trade indebtedness which may be owing by either FDI or Dealer to the other, and except that this Agreement shall not operate to cancel any of Dealer's unfilled orders with FDI for any Fiat passenger cars, parts and products placed with FDI pursuant to the provisions of any sales agreement terminated or superseded by this Agreement. Except as herein otherwise provided, upon execution of this Agreement and in consideration of the execution thereof by FDI, Dealer releases FDI from any and all claims, demands, contracts, and liabilities (including statutory liabilities) of any kind or nature whatsoever, arising from or out of or in connection with any such prior agreements.

SEVENTH: This Agreement shall not become effective until signed at FDI's headquarters in New Jersey, by the President or two Vice Presidents of FDI. No representative of FDI shall have authority, other than by a writing signed as above, to waive any performance under or any of the provisions of this Agreement or to make any amendment or modification of, or any other change in, any printed portion of this Agreement, or to make any agreement which imposes obligations on either FDI or Dealer not specifically imposed by this Agreement, or which renews this Agreement.

EIGHTH: This Agreement shall continue in full force and effect until terminated by Dealer in accordance with the provisions of paragraph 51 of the Standard

Provisions of this Agreement, or until terminated by FDI in accordance with the provisions of paragraph 52 of the Standard Provisions of this Agreement.

NINTH: Except as provided herein, FDI shall not be under any liability whatsoever for any expenditure made or incurred by Dealer in connection with Dealer's performance of its obligations pursuant to this Agreement.

TENTH: This Agreement is to be governed by, and construed according to, the laws of the State of New York. It is understood, however, that it is a general form of agreement designed for use in any state; and it is therefore agreed that any provision herein contained which in any way contravenes the laws of any state or constituted authority which may apply to this Agreement, shall be deemed to be deleted herefrom.

ELEVENTH: Any notice to be given hereunder may be delivered to the party if a sole proprietor, to a partner of the party if a partnership, or to an officer of the party if a corporation, or may be given by sending such notice by registered mail or by telegram addressed, as to Dealer, to its principal office as above stated, and as to FDI, to its headquarters as above stated, marked "Attention President or Vice President—Sales." Except as otherwise provided, any notice so given shall be considered to have been given when delivered or mailed as provided above.

IN WITNESS OF THE FOREGOING, this Agreement is signed hereunder in duplicate by the parties hereto as of the date first appearing.

CORAL GABLES IMPORTED MOTOR CARS, INC.
(Dealer's Firm Name)

BY /s/ [illegible]

TITLE Pres.

WITNESS /s/ [illegible]

Fiat Distributors, Inc.

BY /s/ D. E. Manning

TITLE _____
President or Vice President

By _____
Vice President

Recommended by /s/ [illegible]
Zone Sales Manager

FIAT DISTRIBUTORS, INC.
FIAT DEALER OPERATING REQUIREMENTS AGREEMENT

Fiat Distributors, Inc., in its sincere desire to promote and improve the merchandising and servicing of Fiat passenger cars in the United States, through the cooperation of independently owned and operated Fiat dealerships, recognizes the need for sound business practices—ethical while competitive—if the long-range goals of Fiat Distributors, Inc. and its dealers are to be achieved. In this recognition, Fiat Distributors, Inc. has established standards for dealership operations, in the knowledge that adherence to such standards will enhance the public image of Fiat vehicles and of the dealers who sell and service them and will help insure the mutual success of Fiat Distributors, Inc. and its dealers.

Dealer recognizes that public confidence is the priceless ingredient in any successful sales and service program, and agrees that such confidence is earned only by conducting its business in such a manner as to assure its customers of fair play, dependability and efficiency of service.

For these reasons, the undersigned Dealer agrees to operate and conduct its Fiat business in accordance with the Fiat Distributors, Inc. Fiat Dealer Sales and Service Agreement, the Fiat Distributors, Inc., Fiat Dealer Sales and Service Agreement Standard Provisions such reasonable standards as may be established by Fiat Distributors, Inc. for the Dealer from time to time for net working capital, wholesale finance commitment, personnel, sales objectives, used cars; service and parts

departments, inventories and other elements of the Dealer's operations. The standards in effect on the date hereof are set forth below.

I. GENERAL

It is agreed that Dealer will, through all its departments, safeguard and promote the reputation of Fiat products and avoid discourteous, deceptive, misleading or unethical practices, and will do everything in its power to establish good customer relations. In addition, Dealer will provide the following:

A. Net Working Capital will be maintained at not less than $110,000.

B. A wholesale finance commitment on a continuing basis by a financing institution approved by FDI will be provided and maintained exclusively for Fiat in a minimum amount of $200,000.

C. The following persons will participate actively in the daily operation and management of Dealer's Fiat business.

New Car Sales Manager Fred Couch

Used Car Sales Manager Tony Petrozelli

Service Manager Gene Richmond

Parts Manager Clearance Jones

D. Approved standard "FIAT" identification signs will be prominently displayed and maintained in good condition.

E. Dealership will maintain competitive working hours to assure customers and owners as fine service as possible.

F. Dealer will advertise and promote Fiat passenger cars and service in a businesslike manner.

G. Office space, closing rooms and other public areas of dealership will be maintained in presentable condition.

II. SALES DEPARTMENT

Dealer recognizes that the successful operation of its dealership requires an attractive display area staffed by competent personnel adequately compensated and under effective supervision. Dealer therefore agrees that the following sales facilities will be provided:

A. Fiat passenger cars will be displayed in a properly illuminated showroom in a manner to make them accessible to the public and customers.

B. Dealership will employ at all times a minimum of 6 salesmen, who will be trained in accordance with Fiat Distributors, Inc. standards and be exclusively assigned to the sale of Fiat vehicles.

C. A Fiat Salesman's Compensation Plan will be provided as follows: 20% of retail gross plus bonus plans.

D. It is agreed that the Sales Objective for Fiat passenger cars will be 390 during 1976, subject to changes as aforesaid.

E. The minimum inventory of Fiat passenger cars in Dealer's stock during 1976 will be 65 units, consisting of a representative inventory of all models, of Fiat vehicles, if sufficient cars are available from Fiat Distributors, Inc.

F. The number of Fiat demonstrators in use will be 6 units. These will be maintained in top condition mechanically and in appearance.

G. The minimum showroom area exclusively for Fiat passenger cars will be 1250 sq.ft.

III. USED CAR DEPARTMENT

Recognizing the importance to the success of the dealership of a well operated Used Car Department, Dealer agrees to provide the following Used Car Facilities:

A. It is agreed that no Fiat vehicle will be advertised or displayed "For Sale" which has not been properly reconditioned.

B. Used car display area will be properly lighted. Used Fiat vehicles will be prominently displayed.

C. Fiat used car sales reports will be submitted in accordance with Fiat Distributors, Inc. recommendations.

D. Every effort will be put forth to enhance the value of used Fiat passengers cars.

IV. SERVICE DEPARTMENT

Recognizing that the quality of the service offered Fiat customers will be reflected in the success of the dealership as a whole, Dealer agrees that it will offer its customers prompt, courteous, dependable service at fair prices. Dealer agrees to effect the changes and/or improvements recommended by Fiat Distributors, Inc. in the course of an analysis of Dealer's Service Department outlined below under "VI. Deficiencies."

V. PARTS DEPARTMENT

Recognizing that an efficient and properly stocked parts department is essential to the successful operation of Dealer's service department, and to the maintenance of customer goodwill, Dealer agrees to provide the following parts facilities:

A. Minimum number of personnel assigned to Fiat parts: 3

B. Parts Department will be adequately staffed.

C. Parts bins and storage space will be provided for Fiat parts in accordance with Fiat Distributors, Inc. surveys and recommendations from time to time.

D. Parts will be binned in such a manner as to maintain physical separation of Fiat parts from other make parts in inventory.

E. Fiat parts inventory will be maintained at a 90-day supply.

F. Parts orders for stock will be made at monthly or bi-monthly intervals, and individual items will be reordered when inventory reaches a 60-day supply.

G. A perpetual inventory and accounting system will be maintained to enable the Parts Department to show separately Fiat parts purchases, inventories, sales and gross profits.

H. It is agreed that dealership will price its parts to customers fairly and will be guided by retail prices suggested by Fiat Distributors, Inc.

I. It is agreed that dealership will sell parts to independent garages on a competitive basis and will be guided by the discounts as suggested by Fiat Distributors, Inc.

VI. DEFICIENCIES

It is agreed that all of the recommendations, changes and deficiencies outlined below will be completed within the time indicated.

1) Dlr will have 12 mechanics as required by March 30, 1976 (additional four (4))

2) Dlr agrees to hire shop foreman by 3/30/76

Fiat Distributors, Inc. makes available to Dealer not only Fiat vehicles, but also the efforts of a team of specialists whose purpose is to assist Dealer in achieving its goals of a successful and profitable dealership. Dealer, recognizing that its responsibility demands the most effective use of its available facilities, capital and

personnel, agrees that the above statements constitute its commitments to Fiat Distributors, Inc. for meeting the Standards of Operation established for its market now and in the future.

CORAL GABLES IMPORTED MOTORCARS, INC.
(Dealer's Firm Name)

By /s/ C. M. Rebhan
(Signature of Authorized Person)

Title Pres.

Date Signed 12/18/75

Accepted: Fiat Distributors, Inc.

By /s/ D. E. Manning

Title _____
President or Vice President

_____
Vice President

FIAT DISTRIBUTORS, INC.
DEALER SALES AND SERVICE AGREEMENT
STANDARD PROVISIONS

The following Standard Provisions have been made a part of and are incorporated by reference in the FDI Fiat Dealer Sales and Service Agreement and shall apply to and govern the transactions, dealings, and relations between FDI and Dealer, as therein identified:

1. Promoting Fiat Reputation

In the conduct of its business, Dealer shall safeguard and promote the reputation of Fiat and FDI products, and of Fiat S.p.A. and FDI, and shall refrain from all conduct which might be harmful to such reputation or to the marketing of such products or inconsistent with the public interest, and shall avoid all discourteous, deceptive, misleading, or unethical practices.

2. Dealer Relationship

The relationship between FDI and Dealer during the term of this Agreement shall be that of vendor and vendee. Dealer is not the agent or legal representative of FDI or Fiat S.p.A. for any purpose whatsoever and is not granted, by the terms or execution of this Agreement or otherwise, any express or implied right or authority to assume or create any obligation or responsibility on behalf of or in the name of FDI or Fiat S.p.A., in any manner or thing whatsoever.

3. Capital Requirements

Dealer recognizes that in order to conduct its business on a profitable basis and in order to fulfill properly its obligations under this Agreement, it is necessary for Dealer to maintain, in addition to the net working capital and wholesale finance commitment referred to in the Dealer Operating Requirements adequate cash and net worth—the amount thereof depending upon many factors, including among others, size of market, sales and service facilities required, and anticipated volume. Since FDI has set standards for cash, working capital, wholesale finance commitment and net worth requirements of its dealers based on past Agreement experience, Dealer agrees to establish and maintain its cash, net working capital, wholesale finance commitment and net worth in the amounts and forms which FDI deems necessary for the conduct of Dealer's business hereunder. If the amount of Dealer's cash, net working capital, wholesale finance commitment or net worth is at any time inadequate in FDI's estimation for the proper conduct of Dealer's business, Dealer will take the necessary steps to meet FDI's applicable requirement's within a reasonable period of time as specified by FDI.

4. Trade Names Trademarks Patents Signs

(a) USE OF FIAT. Dealer may use the word "Fiat" or any other name, trade name, or trademark adopted or used by Fiat S.p.A., or by subsidiaries of either, in connection with and for the purpose of identification, advertising, sale and merchandising of Fiat or FDI Products; but shall not use the word "Fiat" or any other name, trade name, or trademark adopted or used by Fiat S.p.A., FDI, or their subsidiaries, or any coined

word or combination containing any of such words in the name under which Dealer conducts its business, if a sole proprietorship or a partnership, or in the name of Dealer, if a corporation.

(b) RECOMMENDED AND APPROVED SIGNS. Dealer shall display such signs and other indicia indicating that Dealer's place or places of business are those of an authorized Dealer of Fiat or FDI Products at such place or places and in such manner as FDI recommends or approves, and not otherwise.

(c) DISCONTINUANCE OF USE ON TERMINATION. Except as hereinafter expressly provided, Dealer shall immediately upon termination of this Agreement cease to be an authorized Fiat dealer, and at Dealer's sole expense shall:

(i) Discontinue and thereafter refrain from the use and/or display, directly or indirectly, of any name, word, trade name or trademark, use of which is permitted under paragraphs 4(a) and 4(b) hereof, and of any stationery, printed matter, advertising or advertising cuts containing any name, word, trade name or trademark, use of which is permitted under paragraphs 4(a) and 4(b) hereof; and

(ii) Refrain from any use and/or display, directly or indirectly, of any name, word, trade name, trademark, coined word or combination thereof so nearly resembling any name, word, trade name or trademark used or claimed by Fiat S.p.A., FDI or subsidiaries of either, as would be likely to lead to confusion or uncertainty.

In the event that at the effective date of the termination of this Agreement, Dealer has any Fiat or FDI Products on hand, then Dealer may continue the uses permitted by paragraphs 4(a) and 4(b) so long as Dealer has any such unsold Products on hand, but in no event for a period exceeding ninety (90) days after the effective date of the termination of this Agreement, provided, however, that Dealer may not continue so to do after any exercise of the option to repurchase pursuant to paragraph 56 hereof.

(d) CONTEST OF TRADE NAMES, PATENTS AND TRADEMARKS. Dealer shall not:

(i) Contest the exclusive rights of Fiat S.p.A., FDI or any subsidiary of either, to any trade mark or trade name at any time owned or claimed by Fiat S.p.A., FDI or any subsidiary of either;

(ii) Contest the validity of any patent owned or claimed by Fiat S.p.A., FDI or any subsidiary of either, and/or under which Fiat S.p.A., FDI or any subsidiary of either has or claims any right, title or interest; or

(iii) Unless otherwise directed by Fiat S.p.A., or FDI, remove, alter or cause to be removed or altered the patent numbers, trade-marks and/or trade names affixed to any Fiat or FDI Product, nor shall Dealer, unless otherwise directed by Fiat S.p.A. or FDI affix or cause to be affixed any patent number, trade-mark or trade name to any Fiat or FDI Product.

5. Advertising

Both FDI and Dealer recognize the need for maintaining the highest standards of ethical advertising consistent with the reputation and standing of FDI Products in order to maintain public confidence and respect in Dealer, FDI and FDI Products.

Accordingly, neither FDI nor Dealer will publish, nor cause or permit to be published, any advertising relating to FDI Products which is likely to mislead or deceive the public or to impair the goodwill of FDI or Dealer or the reputation of FDI Products.

6. Cooperative Advertising Fund

In order to give Dealer the advantages of a comprehensive and coordinated dealer advertising program, a cooperative advertising fund has been established which, for purposes of effectiveness and economy is under the control of, and is administered by, FDI for the benefit of all dealers.

The Cooperative Advertising Fund, as set forth from time to time in FDI Sales Letters, will be accumulated in a separate advertising account for each individual dealer.

7. Contributions and Handling of Fund

The funds in this Cooperative Advertising Account are available to Dealer on arrangements made with approval granted by FDI, and are to be used only for the cost of new car advertising (including preparation expense for such advertising), scheduled in Dealer's

local market, in addition to his normal, budgeted local advertising expenditures.

Such funds shall remain to the credit of Dealer, with any balance remaining at the end of the year being carried forward.

8. Cooperative Promotion Service

Dealer will benefit from the simultaneous use by all dealers in FDI Products of effective new model announcement literature, catalogs, banners and like materials from the economies attendant upon preparation and purchase by FDI of basic Sales Promotion Literature, Parts and Service Manuals and other materials, for all dealers. This service will include such new model announcement and other sales promotion materials, and parts and service materials, as are described from time to time in FDI Sales Letters. Dealer agrees to contribute to the cost of such cooperative sales promotion service such amount per Fiat passenger car purchased from FDI as FDI shall establish from time to time. Such amounts do not include the cost of special campaigns or special literature not described in such letters.

In calculating the distribution of the total cost of materials under this heading, it will be expected that Dealer's contribution will amount to approximately one-third (1/3) and FDI's two-thirds (2/3).

9. Exhibitions, Etc.

Dealer shall participate, at its expense, in exhibitions, fairs and other similar events in keeping with the market sales potential and practices of Dealer's market area.

Dealer shall use its best efforts to promote the sale of Fiat passenger cars in its market area through regular contacts with owners and prospective owners and through such means as may be suggested from time to time by FDI.

10. Sales Promotion and Performance

Dealer shall use its best efforts in order to achieve maximum sales performance in its market area for Fiat passenger cars. Such sales performance shall be evaluated on the basis of such reasonable criteria as may be determined from time to time to be pertinent, including, but not limited to:

(a) Fair and reasonable sales objectives which have been agreed upon or which may be established from time to time by FDI for Dealer;

(b) The ratio of sales of Fiat passenger cars to other makes of passenger cars of comparable quality, price and specifications in the area;

(c) The development of Dealer's sales performance over a reasonable period of time; and

(d) Particular conditions in the area, if any, directly affecting sales performance and potential sales performance.

Where in addition to Dealer other Fiat dealers operate within the area, as in a metropolitan area, the combined sales performance of all Fiat dealers in the area shall be evaluated as indicated in the preceding sentence, and Dealer's sales performance shall be evaluated on the basis of that proportion of the sales and potential sales of Fiat passenger cars in the area for which Dealer fairly may be held responsible according to such reasonable criteria as FDI may determine from time to time, including, but not limited to, the location of Dealer's salesroom, the general shopping habits of the public within the area, the history of Dealer's sales participation within the area, and standards for Dealer's sales participation within the area as previously determined by FDI and accepted by Dealer.

11. Dealer's Stock

Dealer shall purchase and maintain on hand at all times for display and demonstration purposes an adequate stock of Fiat passenger cars to meet the requirements for Dealer's territory, and Dealer shall maintain an adequate number and assortment of parts and accessories.

12. Demonstrators

Dealer shall also have available at all times for purposes of demonstration Fiat passenger cars of the most current models and shall keep the same at all times in first class operating condition.

13. Handling of Dealer Orders

(a) In order to facilitate the orderly scheduling of importation, assembly or production, and deliveries,

Dealer shall when requested by FDI prepare and submit, on forms approved by FDI, a projection showing estimates of Fiat passenger cars required by him during the next ninety (90) days.

(b) FDI shall give careful consideration to each order received from Dealer for Fiat passenger cars and other FDI Products. Shipments of such products will be made via routes specified by Dealer wherever possible, but FDI shall not be liable where means of transportation are found necessary that do not conform with Dealer's request.

(c) FDI, however, will not ship any FDI Products to Dealer, except pursuant to Dealer's specific order.

14. Delays in Delivery

FDI shall not be under any liability to Dealer for failure to deliver or for delay in making delivery pursuant to orders of Dealer accepted by FDI, if such failure or delay is due to the fact that delivery or timely delivery was rendered impossible or more burdensome than it would have been in the normal course of business by any event, whether or not forseen or foreseeable, brought about by causes other than willful or grossly negligent conduct of FDI, such as for instance, any event in the nature of force majeure, acts of God, acts of any government, foreign or civil wars, riots, interruptions of navigation, shipwrecks, strikes, lockouts, other labor troubles, embargoes, blockades, fires, explosions, failures of Fiat S.p.A. or any other supplier of FDI in making delivery—the foregoing specific events being listed herein only by way of illustration and not by way of limitation.

15. Price

The Dealer Price of each FDI Product shall be determined and sent to Dealer by FDI. FDI may find it necessary to revise Dealer Prices from time to time, and shall notify Dealer of any such revision. Revisions in Dealer Prices shall be effective on the date specified by FDI.

16. Lines of Credit

Dealer shall maintain a line or lines of credit with a financing institution or institutions satisfactory to FDI in a total minimum amount sufficient to purchase or to finance the purchase by Dealer of Fiat passenger cars required by Dealer for a period of ninety (90) days, as determined by the normal expectancy of Dealer's market area.

17. Payment For Vehicles

Payment for each Fiat passenger car purchased by Dealer shall be made in cash at the time of delivery unless the invoice provides otherwise, in which event the terms of the invoice shall govern. Receipt of any letter of credit, check, draft, or other commercial paper in connection with the sale of any such vehicle shall not constitute payment therefor until FDI has received cash in the full amount payable under such instrument. Dealer shall pay all collection charges.

18. Passing of Title

Title to Fiat passenger cars shall pass to Dealer upon receipt by FDI of full payment therefor.

19. Failure to Accept Delivery

In the event that Dealer should fail or refuse, for any reason whatsoever, to accept delivery of any Fiat passenger car ordered by Dealer, Dealer shall pay FDI the amount of all expenses incurred by FDI in shipping such Fiat passenger car to Dealer and in returning it to the original point of delivery or in directing it to another destination. The liabilities of Dealer pursuant to this paragraph shall be in addition to, and not in lieu of, such other liabilities as may arise from Dealer's failure or refusal to accept delivery.

20. Demurrage and Diversions

Dealer shall be responsible for and shall pay any and all charges for demurrage, storage and other charges accruing after arrival of any shipment at its delivery point specified by Dealer. If diversions of shipments are made upon Dealer's request, Dealer agrees to pay the additional charges and expenses incident to such diversions, but in no event shall Dealer pay FDI an amount in excess of the charges or expenses incident to returning shipments to their original shipping points.

21. Price Increases

Whenever FDI shall increase the Dealer Price for any model of Fiat passenger car, Dealer shall have the right, with respect to any Fiat passenger car to which such increase is applicable, to cancel outstanding orders, by notice to FDI within ten (10) days after receipt by Dealer of notice of such increase, provided, however, that such right to cancel shall apply only to Fiat passenger cars undelivered by FDI at the time of receipt by FDI

of such cancellation notice. Failure to so cancel within the time specified will constitute a confirmation of all undelivered orders in accordance with such price increase.

22. Price Reductions

In the event FDI at any time shall reduce the Dealer Price by the sum of Five Dollars ($5.00) or more for any model of Fiat passenger car being offered for sale by FDI as a current model on the effective date of such reduction, FDI shall provide a refund or credit to Dealer as follows. For each new, unused, undamaged, and unsold Fiat passenger car (and for each unsold new car demonstrator which was duly registered with FDI when assigned to such use) of such current model in Dealer's stock on the effective date of such reduction, FDI will refund or credit to Dealer an amount equal to the amount by which the cost to Dealer exceeds the new Dealer price established by FDI for such Fiat passenger car.

23. Refunds and Credits

FDI shall make refunds and credits provided for in Paragraph 22 only if Dealer shall submit written application therefor, supported by evidence on a form or forms furnished by FDI, within thirty (30) days from the date Dealer becomes eligible to receive such refund or credit.

FDI reserves the right to pay any refund on any Fiat passenger car for which application for refund or credit is made by Dealer to any financing institution which financed the purchase from FDI of such Fiat

passenger car and which retains a security or ownership interest thereon or an ownership interest therein.

24. Refund Limitations

FDI shall have no obligation to make refunds or credits under Paragraph 22 with respect to:

(a) Any Fiat passenger car which has been used as a demonstrator and was not promptly registered with FDI by Dealer when assigned to demonstrator use;

(b) Any reduction in the amount of FDI charges for distribution and delivery or taxes;

(c) Any reduction in the amount of any contribution or any other sum for advertising or sales promotion;

(d) Any reduction in the suggested retail price or Dealer Price made by FDI or any lower suggested retail price or Dealer Price established by FDI by reason of any law, order, or regulation of any government or any governmental agency;

(e) Any new and unused Fiat passenger cars which FDI deems unsalable as new cars by reason of damage caused by fire, flood, accident, or otherwise; or

(f) Any Fiat passenger cars of prior manufacture for which a special allowance has been previously made by FDI.

25. Cost to Dealer

The phrase "cost to Dealer", as used in Paragraph 22 above, shall be deemed to mean the Dealer Price at which Dealer purchased the Fiat passenger car from FDI, less all refunds, credits, rebates, allowances, and discounts made by FDI to dealer with respect to such Fiat passenger car.

26. Changes in Design or Specifications

FDI and Fiat S.p.A. reserve the right, at any time, to make changes in the design or specifications of Fiat passenger cars and Fiat parts and accessories without notice to Dealer and without obligation to make such changes with respect to Fiat passenger cars and Fiat parts and accessories previously delivered to Dealer or being imported, manufactured, or sold in accordance with Dealer's orders, and, unless otherwise provided for herein, without any obligation to Dealer to make any refund upon any Fiat passenger cars or Fiat parts and accessories previously purchased by Dealer, whether or not the price of FDI Products previously sold by FDI is affected thereby.

27. Passing of Risks

Any Fiat passenger car sold to Dealer shall be at Dealer's risk from the time of its delivery to Dealer, Dealer's agent at the place of delivery specified in FDI's established terms of delivery and during all subsequent transportation; and it shall be the obligation of Dealer to insure, at its own expense, such risks for its benefit, and for the benefit of FDI when payment has not been made in full.

28. Extent of FDI's Responsibility For Damage

FDI assumes responsibility for the condition of Fiat passenger cars to the extent of damage caused by any event occurring after manufacture and prior to delivery of any Fiat passenger car to Dealer or Dealer's agent.

29. Claims

All claims that Fiat passenger cars have been delivered with parts missing must be made in writing to FDI within five (5) days after receipt of the shipment with respect to which such claims are made in accordance with the applicable provisions of FDI's "Fiat Warranty Procedure Manual".

30. Property Liability

FDI shall not be liable for damage by fire or other cause to property belonging to Dealer or to Dealer's customers, while such property shall be on premises of, or in possession of, FDI.

31. Representations in Sale of Fiat Passenger Cars

Dealer shall neither sell as a new Fiat passenger car any Fiat passenger car which is not in fact new and unused, nor misrepresent a model year or year of manufacture of any Fiat passenger car; and Dealer shall sell all Fiat passenger cars in accordance with such directives as FDI shall issue, from time to time, for the designation of model and age classifications of Fiat passenger cars.

32. Compliance With Laws

Dealer shall comply with all laws of the local, state, and federal governments respecting licensing, registration, and model year requirements.

33. Local Taxes

With each order furnished by Dealer to FDI, Dealer represents and warrants, as of the date of the purchase of the Fiat passenger cars ordered, that all Fiat passenger cars purchased from FDI are purchased by Dealer for resale in the ordinary course of Dealer's business. Dealer shall pay any and all sales taxes, use taxes, excise taxes, and other governmental or municipal charges imposed or levied or based upon the sale of Fiat passenger cars by FDI to Dealer, except federal excise taxes which may be included in the price of FDI to Dealer.

34. Customer Deposits

Dealer shall hold in trust each deposit of money and/or property received from a customer in anticipation of a future delivery of a Fiat passenger car to such customer until such delivery is consummated; and until such delivery is consummated, Dealer shall: (a) keep any such money in a separately designated trust fund not commingled with Dealer's own funds, and (b) hold title to any such property in trust, and not place or permit the placing of any lien on such property, or sell the same without at the time placing in such a trust fund a sum in cash equal to the amount of the allowance granted to the customer by Dealer with respect thereto. Dealer shall enter into an agreement with each prospective

customer at the time such deposit or transfer is made, binding Dealer with respect to such money or property as provided above.

35. Customer Service

Dealer shall provide the best possible customer service for all owners of Fiat passenger cars, performing all work in a good and workmanlike manner, and shall use its best efforts to promote its customer service in the area at reasonable prices charged to Fiat owners. Dealer will receive, investigate and handle all complaints received from Fiat owners with a view to securing and maintaining the goodwill of the public toward Dealer, Fiat and FDI Products, and Fiat S.p.A. and FDI. All complaints received by Dealer which cannot be readily remedied shall be promptly reported in detail to FDI. Service facilities, including buildings and appearance, layout and amount of service space, and special Fiat tools and equipment, shall be recommended by FDI and will be in keeping with the sales potential and market area involved, and Dealer shall comply with such reasonable recommendations of FDI as they may be modified from time to time. Dealer agrees to make its technical personnel available to attend such FDI technical training classes as will be conducted on a regular basis at FDI's Regional Training Centers, and/or such FDI technical training classes as may be conducted from time to time at other convenient locations within the FDI Region in which dealer is located.

36. Genuine Fiat Parts, Accessories and Equipment

Dealer shall not sell, offer for sale or recommend for sale or use, or allow to be sold, offered for sale or

recommended for sale or use, as genuine new Fiat Products or FDI Products any products which are not in fact genuine new Fiat Products or FDI Products manufactured by or for Fiat S.p.A. or FDI.

37. Customer Warranty

Each Fiat passenger car and each Fiat part and accessory supplied by FDI will be warranted by FDI to Dealer only in accordance with FDI's "Fiat Warranty Procedure Manual" or any other warranty regulation in effect on the day of retail delivery of the respective product. The procedure for the processing and disposition of warranty claims and for the return and disposition of Fiat parts and accessories claimed to be defective shall be established from time to time by directives of FDI. Dealer shall comply with all requests of FDI for the performance of services pursuant to warranty claims.

38. Fiat Customer Warranty In Dealer's Sales

Dealer, acting on Dealer's behalf only, shall furnish the customer a warranty similar to the warranty made by FDI in connection with each sale by Dealer of a Fiat passenger car or Fiat parts. Dealer shall perform and fulfill promptly all the terms and conditions of each such warranty.

39. Owner's Service Policy

Dealer, acting on Dealer's behalf only, shall execute and deliver to each retail purchaser of a Fiat passenger car from Dealer an "Owner's Warranty and Service Book" on a form furnished by FDI, shall perform the required pre-delivery inspection and shall obtain and

transmit to FDI the signed Acceptance and Pre-Delivery Certificate. Dealer shall perform and fulfill promptly all of the terms and provisions of each "Owner's Warranty and Service Book" executed and delivered by Dealer, or by another authorized Fiat dealer, in accordance with the provisions of the "Warranty Procedure Manual."

40. Parts Inventory

Dealer shall acquire and at all times maintain a minimum inventory of Fiat parts necessary to satisfy at any given time the requirements of Dealer's business for a period of ninety (90) days, in such assortment as FDI reasonably may require from time to time by notice in writing to Dealer.

41. Fiat Parts Price

FDI shall sell Fiat parts and accessories to Dealer, and Dealer shall buy the same from FDI, at such prices and upon such terms as may be established from time to time by FDI. Dealer shall pay any and all sales taxes, use taxes, excise taxes, and other governmental or municipal charges imposed or levied or based upon the sale of Fiat parts by FDI to Dealer, except federal excise taxes which may be included in the price of FDI to Dealer.

42. Payment For Parts

Dealer's orders for Fiat parts and accessories will be filled on the basis of payment terms established by FDI for Dealer's account from time to time. Such terms may provide for open account, limited open account, C.O.D., or cash. Collection charges, if any, on C.O.D. are

to be paid by Dealer. In the event open account terms apply, Dealer will be billed net cash payable the fifteenth (15th) day of the month following the date of billing. Dealer will pay the total amount of such monthly billings without deductions for any reason.

43. Parts Delivery

Delivery of Fiat parts and accessories ordered by Dealer shall be made by delivery to Dealer or to a carrier or United States Mail for shipment to dealer.

44. Right to Return Parts

Except as set forth below, Dealer may, pursuant to written notice given to FDI within sixty (60) days after receipt of any new Fiat parts purchased hereunder, return them for credit. With respect to the initial Fiat parts order shipped to Dealer pursuant to the provisions of this Agreement, such written notice may be given only during the period commencing six (6) months from the date of execution of this Agreement on behalf of FDI and terminating twelve (12) months from such date and such initial parts may be returned only in exchange for other Fiat parts. No such parts shall be returned, until the Dealer shall have furnished FDI with a list of the Fiat parts to be returned, upon receipt of which FDI will advise Dealer as to shipping instructions. Such Fiat parts shall be returned, transportation charges prepaid, to the destination specified by, and in accordance with, such instructions from FDI. At no time, however, are transportation charges paid by Dealer to exceed the transportation cost from Dealer's regular supply warehouse.

45. Defective Parts Return

Dealer may, upon application and specific authorization from FDI, return defective Fiat parts to FDI for credit at the Dealer Price therefor in effect at the date such Fiat parts are recieved by FDI, such parts to be shipped, transportation charges prepaid, to the destination specified by FDI. Dealer will be reimbursed for transportation charges prepaid by it on authorized shipments of defective Fiat parts.

46. Obsolescent Parts Return

Dealer may return to FDI during each calendar year parts and accessories of a value (at the Dealer price currently in effect) not exceeding 4% of the net dollar value of all the parts and accessories purchased by Dealer from FDI during such year, in exchange for new parts and accessories having a net dollar value equal to that of those returned. No such parts or accessories shall be returned, however, until Dealer shall have furnished FDI with a list of the parts or accessories to be returned, upon receipt of which FDI will advise Dealer as to shipping instructions. Such parts and accessories shall be returned, transportation charges prepaid, to the destination specified by and in accordance with such instructions from FDI. At no time, however, are the transportation charges paid by Dealer to exceed the transportation cost from Dealer's regular supplying warehouse.

47. Modifications

FDI may request Dealer to make modifications or refrain from making modifications of Fiat passenger

cars, as may be prescribed from time to time by Fiat S.p.A. and FDI, including, but not limited to, modifications required in order to implement any action undertaken by Fiat S.p.A. or FDI pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, as amended, the Clean Air Act, as amended, or any other legislation or regulation pertaining to vehicle safety or air pollution, and Dealer shall promptly comply with such requests. FDI shall assume the cost of any Fiat parts and, at the rates as FDI may approve from time to time, of any labor which may be used by Dealer in making modifications of Fiat passenger cars requested by FDI pursuant to this paragraph.

Dealer shall not install or replace any equipment or otherwise modify or alter any Fiat passenger car at the request of a customer or on its own initiative in a manner that will result in such vehicle no longer confirming to the safety or emission control standards under the aforesaid acts.

48. Dealer's Accounting

Dealer shall keep accurate and current books of account in accordance with the FDI uniform accounting system and with accounting practices reasonably satisfactory to FDI and enabling FDI to develop comparative data in order, among other things, to furnish to dealer, for dealer's benefit, business management assistance.

(a) Dealer shall mail or deliver to FDI on or before the tenth day of each calendar month on such forms as FDI reasonably may require, a financial and operating statement, reflecting separately dealer's operations for

the preceding month and dealer's operations from the beginning of the calendar year to the end of the preceding month.

(b) Within three (3) months after the close of a dealer's fiscal or calendar year, dealer shall deliver to FDI a financial and operating statement for such year which shall be certified by a certified public accountant, unless FDI shall, by notice in writing to dealer, specifically waive the requirement of certification.

49. Sales Reports

Dealer shall furnish to FDI, on such forms and at such times as FDI reasonably may require, complete and accurate reports of Dealer's sales and stocks of new Fiat passenger cars, used Fiat passenger cars, Fiat parts, and of other used automobiles.

50. Inspection of Premises and Records

Until the termination of this Agreement and thereafter until consummation of all the transactions referred to herein, FDI, through its employees and other designees, shall have the right, at all reasonable times during regular business hours, to inspect Dealer's records and accounts.

51. Termination by Dealer

Dealer may terminate this Agreement at any time by written notice of termination delivered to FDI. Such notice of termination shall be delivered not less than thirty (30) days prior to the effective date of termination.

52. Termination By Notice Effective Immediately

Anything herein to the contrary notwithstanding,

(a) notice of termination of this Agreement effective immediately, may be given by either party in any of the following events: (i) death of Dealer if Dealer is an individual or of any partner if Dealer is a partnership; (ii) insolvency or bankruptcy of Dealer, appointment by a court of a receiver, trustee or custodian for Dealer or Dealer's business, or an assignment by Dealer for benefit of creditors; (iii) failure of either party to obtain any license required to enable such party to carry out its obligations under this Agreement, or the revocation or suspension for any period whatever of any such license; and

(b) notice of termination of this Agreement effective immediately, may be given by FDI in any of the following events. (i) the failure or refusal on Dealer's part to fulfill or perform any one or more of his duties, obligations and responsibilities to be performed under this Agreement, provided that FDI shall have notified Dealer of such failure or refusal at least sixty (60) days prior to the giving of such written notice of termination and Dealer shall not have either remedied or ceased such failure or refusal or taken action satisfactory to FDI to prevent the recurrence in the future of such failure or refusal, Dealer hereby acknowledging and agreeing that each of such duties, obligations and responsibilities is reasonable and proper and that failure or refusal to perform any of them would constitute a material breach of this Agreement; (ii) dissolution of Dealer if Dealer is a corporation or co-partnership; (iii) any assignment or attempted assignment by Dealer of this Agreement

without FDI's written consent; (iv) any change in the ownership of or financial interest in Dealer without the prior written consent of FDI; (v) failure of Dealer for any reason to function in the ordinary course of business, or failure for any reason to keep Dealer's place of business open during the hours customary in the trade; (vi) a disagreement between or among any principals, partners, managers, officers or stockholders of Dealer which in the opinion of FDI may affect adversely the ownership, operation, management, business or interest of Dealer or FDI; (vii) the death of any of the persons referred to in Article Fourth of the Dealer Sales and Service Agreement; (viii) conviction in a court of competent jurisdiction of Dealer, or a partner, manager, principal, officer or major stockholder, for any violation of law tending in FDI's opinion to affect adversely the operation or business of Dealer or the good name, goodwill or reputation of Fiat S.p.A., FDI, FDI or Fiat Products, or Dealer; or (ix) submission by Dealer to FDI of false or fradulent statements or reports, including, without limitation, claims for refund, credit, reimbursement or other payment by FDI. Dealer shall advise FDI or cause FDI to be advised immediately in writing of the happening of any of the above specified events.

53. Expiration or Termination of Distributor Sales Agreement

Anything herein to the contrary notwithstanding, this Agreement shall terminate immediately in the event of the termination of the Fiat Sales Agreement between Fiat S.p.A. and FDI or in the event that FDI shall cease to be an authorized Distributor of Fiat Products pursuant to written contract between FDI and Fiat S.p.A.

54. Cancellation of Orders on Termination

In the event of termination of this Agreement in accordance with Paragraphs 51, 52 or 53 hereof, all or any portions of Dealer's orders theretofore received and not as yet filled by FDI shall be automatically cancelled and FDI shall be relieved of any liability in connection therewith. Upon termination of this Agreement, Dealer shall promptly pay to FDI any and all sums owed by it to FDI. Notwithstanding the foregoing, the acceptance of orders from Dealer or the continuance of sale of Fiat passenger cars and/or Fiat or FDI parts and accessories or any other products to Dealer, or any other act of FDI after termination of this Agreement shall not be construed as a renewal of this Agreement nor as a waiver of the termination.

55. Survival of FDI Warranty

Anything herein to the contrary notwithstanding, Paragraphs 37 and 38 shall survive and, in accordance with their respective terms continue in full force and effect, despite any termination of this Agreement brought about pursuant to the provisions outlined.

56. Repurchase Option

If this Agreement terminates for any reason whatsoever, FDI shall have the option, to be exercised by written notice given within thirty (30) days after the effective date of termination, to repurchase and reacquire from Dealer any or all Fiat and FDI Products in Dealer's stock, as FDI shall in its sole discretion select subsequent to the date of such notice, and unsold by Dealer to a bona fide purchaser on the day when

Dealer shall have received such written notice, including Fiat and FDI Products sold to or in the possession of any person, firm or corporation, directly or indirectly owned or controlled by Dealer or affiliated with Dealer by reason of direct or indirect common ownership or control. The price for any Fiat passenger car shall be the Dealer price at which such vehicle was purchased from FDI (excluding FDI's charge or charges for distribution and delivery) plus taxes paid by Dealer at the time of such purchase and less all prior refunds, credits, rebates, allowances, or discounts made by FDI with respect to such vehicle. If any Fiat passenger car is used or damaged or is not in first class salable condition or is of a type and model not being offered for sale by FDI on such date as a current type and model, then the price for such vehicle shall be a reasonable amount less than that prescribed above, to be mutually determined.

The price for any such Fiat or FDI Product other than a Fiat passenger car shall be the last Dealer Price for such Product invoiced to Dealer by FDI, less a fifteen percent (15%) handling charge and less any cash discount at the rate in effect at such time.

Delivery of all Fiat passenger cars reacquired by FDI pursuant to the provisions of this paragraph shall be made by a recognized common carrier to designated port of entry from which dealer normally receives Fiat automobiles. Arrangements with carrier shall be made by dealer and transportation expense shall be dealer's responsibility. Delivery of all Fiat or FDI Products other than Fiat passenger cars reacquired by FDI pursuant to the provisions of this paragraph shall be made by dealer to the Parts Depot servicing dealer. Dealer shall

pack and box all such Fiat or FDI Products carefully, and shipping of such items shall be based on instructions from FDI's Parts Depot and transportation shall be at Dealer's expense. In the event Dealer fails so to pack and box such Products, FDI may do so and deduct the expense thereof from the price of such Products repurchased.

57. Rights of Surviving Persons

Notwithstanding the right of FDI forthwith to bring about the termination of this Agreement for cause, pursuant to Paragraph 52(b) (vii), upon the death of any of the persons referred to in Article Fourth of the Fiat Dealer Sales and Service Agreement, FDI shall not so terminate this Agreement if:

(a) The surviving persons participating in the active management and ownership of Dealer, as stated in Article Fourth of the Fiat Dealer Sales and Service Agreement, remain unchanged and can, in the opinion of FDI, comply with the requirements imposed upon Dealer by this Agreement; or

(b) Within sixty (60) days after the death of such person, arrangements are completed for the assumption of active management and/or ownership of Dealer by persons acknowledged by FDI to be satisfactory to it.

58. Widow's Financial Participation

In the event of the death of any of the persons referred to in Article Fourth of the Fiat Dealer Sales and Service Agreement and in the event such person, at the time of his death, is possessed of a beneficial

interest in the dealership which, by reason of his death, passes directly to his widow and/or children, and if the surviving persons participating in the active management and ownership of Dealer, as stated in said Article Fourth, can, in the opinion of FDI, comply with the requirements imposed upon Dealer by this Agreement, FDI will consent to the retention by such widow and/or children of a financial interest in the dealership, subject, however, to the rights, if any, of the surviving person or persons to buy out the widow's and/or children's interest in accordance with any agreement made by them.

59. Notice of Failure to Act in "Good Faith"

In the interest of maintaining a harmonious relationship between FDI and Dealer, Dealer shall report promptly, in writing, to the President of FDI any act or failure to act on the part of FDI which Dealer deems not to have been, or that Dealer proposes to use in support of a claim that FDI has not acted, in good faith as to Dealer. For the purpose of this paragraph, the term "good faith" shall mean FDI and its representatives acting in a fair, equitable, and impartial manner toward Dealer so as to guarantee Dealer freedom from coercion or intimidation or threats of coercion or intimidation from FDI as those words are employed in the context of the Automobile Dealers Franchise Act., 15 U.S.C.A. §1221, et seq. It is the intention of the parties that the purpose of the requirement of such notification by Dealer is to afford FDI sufficient opportunity to consider the claim of Dealer and if, in the sole determination of FDI, such claim is found to be meritorious, to undertake such measures which may be necessary to correct the condition complained of to the end that FDI shall, at all times, act in good faith as to Dealer.

60. Indemnity

Dealer agrees to indemnify FDI against all actions, claims, damages, expenses and attorneys fee incurred by FDI by reason of any breach of this Agreement by Dealer, or arising out of any action to which FDI is made a party through Dealer, or by reason of the sale, servicing or failure to service Fiat Products by Dealer.

61. General

(a) **No Implied Waivers.** Except as otherwise provided for in this Agreement, the failure of either party at any time to require performance by the other party of any provision hereof shall in no way affect the full right to require such performance at any time thereafter, nor shall the waiver by either party of a breach of any provision hereof constitute a waiver of any succeeding breach of the same or any other such provision, nor constitute a waiver of the provision itself.

(b) **Separability.** In the event any provision of this Agreement shall be determined to be invalid or unenforceable or prohibited by the laws of the State or place where it is to be performed, this Agreement shall be considered divisible as to such provision, and such provision shall be inoperative and shall not be part of the consideration moving from either party to the other, and the remaining provisions of this Agreement shall be valid and binding and of like effect as though such provision were not included herein.

(c) **Representations.** FDI and Dealer both acknowledge that no representation or statement, other than those expressely set forth herein, has been made

by or on behalf of the other, or relied upon in entering into this Agreement that in any way tends to change or modify the terms or any of them of this Agreement, or that in any manner prevents this Agreement from becoming effective; and further acknowledge that there is no other agreement or understanding, either oral or in writing, between the parties affecting this Agreement or relating to the subject matter hereof.

(d) **Waiver of Jury.** FDI and Dealer both acknowledge and agree that any controversy which may arise under this Agreement or the relationship established thereby would be based upon difficult and complicated issues, and therefore the parties agree that any lawsuit growing out of any such controversy will be tried in a court of competent jurisdiction by a judge sitting without a jury.

(e) **No Transfer.** This Agreement, or any part thereof or interest therein, may not be transferred or assigned by the Dealer without the prior written consent of FDI.

(f) **Entire Agreement.** The basic Dealer Sales and Service Agreement and these Standard Provisions (plus the Fiat Dealer Operating Requirements Agreement and FDI's "Fiat Warranty Procedure Manual" as they may be revised from time to time) contain the entire

Agreement between the parties. Dealer acknowledges that he has completely and thoroughly reviewed all of the provisions of this Agreement, including the insertions in the blank spaces contained herein.

CORAL GABLES IMPORTED MOTORCARS, INC.
(Dealer's Firm Name)

By /s/ [Illegible]
(Signature of Authorized Person)

Title Pres.

Date Signed 12/18/75

Accepted: Fiat Distributors, Inc.
By /s/ D. E. Manning

Title _____
President or Vice President

_____
Vice President

APPENDIX H

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

Case No. 80-5787

CORAL GABLES IMPORTED MOTORCARS, INC., and CHARLES M. REBHAN,
Plaintiffs-Appellees,

vs.

FIAT MOTORS OF NORTH AMERICA, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

BRIEF FOR DEFENDANT-APPELLANT

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